

MALAYSIA AS AN ISLAMIC STATE: A POLITICAL ANALYSIS

Abdul Rashid Moten*

Malaysia: An Islamic State?

Is Malaysia an Islamic State? The legitimacy for this question is derived from the fact that Islam serves as a core element of Malay identity and culture and that traditionally in the Malays states, almost all aspects of government were rooted in Islamic sources and principles and were cloaked with an aura of religious sanctity. Islam was a source of legitimacy for sultans, who assumed the role of head of religion, defenders of faith, and the guardians of Islamic and customary law, education, and values. With colonization, the Shari'ah became subservient to British legal codes and enactments and the sultans were subjected to the control of British Residents and Advisers. The integral relationship of Islam to politics, law, and society was suppressed by the colonial government, which also restricted the juristic, political and philosophical discourse pertaining to an Islamic political order. With the departure of the British and the coming of independence in 1957, the question of the Islamic identity of Malaya and later the Malaysian state resurfaced. There emerged a good deal of discussion on the desirability of an Islamic political order which eventually culminated, especially among an increasing segment of the Malay-Muslim community, with the call for the establishment of an Islamic state in Malaya/Malaysia.

The Malayan/Malaysian government led by the first Prime Minister Tunku Abdul Rahman Putra al-Haj did lay the foundation for the introduction of Islamic values in the government and the administration and thus paved the environment conducive to the evolution of an Islamic

* Dr. Abdul Rashid Moten is a Professor at the Department of Political Science, Kuliyyah of Islamic Revealed Knowledge and Human Sciences, International Islamic University Malaysia.

state in the future. He, however, was justifiably preoccupied with ensuring national security and maintaining racial harmony in a multi-ethnic Malaya/Malaysia by "reinforcing cleavages". Hence, while encouraging the ritualistic and symbolic aspects of Islam, he was careful not to publicly declare his interest in establishing an Islamic state.

The religious question that dominated the political scene then revolved around the issue of the feasibility and desirability of transforming Malaysia into an Islamic state. With the appointment of Mahathir Mohamad as the Prime Minister of Malaysia in 1981, things began to change. In 1988, he started referring to Malaysia's "Islamic government" and eventually, on September 29, 2001, he declared that "Malaysia is an Islamic country."¹ With this declaration Malaysia in principle took the shape of an Islamic state. It is the intention and its formal expression involved in the declaration by the Prime Minister, the highest-ranking authority in Malaysia, which is decisive.

The Prime Minister's declaration has changed the nature of Islamic discourse in Malaysia. The Islamic discourse has transcended the aura of Malaysia's mosques, *suraus*, and private Muslim spaces and entered the realm of the political public as a whole. Islamic state has been debated in the media and has also been a major theme for discussion at various Islamic state forums organized by different groups including Malaysian Chinese Association (MCA), Gerakan, Democratic Action Party (DAP), Parti Islam se-Malaysia (PAS), and the Catholic Research Centre. These discussions revolve around three different positions concerning Malaysian state. One position maintains that Malaysia is an Islamic state. This position is well articulated by the Prime Minister and other Ministers and is well summarized in various scholarly publications. Some of the articles are posted on the Jabatan Kemajuan Islam Malaysia's (JAKIM) website. The second position, with PAS in the forefront, considers the Prime Minister's declaration as flimsy and shallow. They argue that the Shari'ah must be declared the law of the land for Malaysia to be considered an Islamic state. The prevalence of corruption, nepotism, discrimination and

1 New Sunday Times, September 30, 2001.

injustice in the country effectively counter the claim of Malaysia being an Islamic state. It must be noted that PAS, that has long been championing the establishment of an Islamic state in Malaysia, has now alloyed its religious appeals with calls for political accountability, greater transparency in business-government relations, and the remedying of "social ills" caused by ceaseless industrialization.²

The third position led by the DAP and other concerned organizations, urge the government to maintain Malaysia's secular character. They consider an "Islamic state of Malaysia" as antithetical to the pluralist nature of the society and, indeed, as repudiating the country's Constitutional and political history which established Malaysia as a secular state. They point to the secular basis of the state in the social contract entered into by Malaysia's founding fathers as is outlined in the Merdeka (Independence) Constitution and upheld in various judicial pronouncements. The Malaysian Consultative Council of Buddhism, Christianity, Hinduism and Sikhism (MCCBCHS) has urged the government to take *cognisance* of the fact that Malaysia is Constitutionally a secular state and that it should respect the right of every person to freedom of religion.

While many have voiced serious concerns, the issue of whether or not Malaysia is an Islamic state and whose definition of an Islamic state prevails, remains unanswered. What should one make of these opposing claims? Is Malaysia an Islamic state? What about Malaysia's hitherto generally accepted secular status? This study, in that it analyzes the "Islamicity" of the Malaysian state, is a humble effort in the same direction. Since there remains considerable vagueness as to the precise nature and form of an Islamic state, this study explains the concepts of secularism and Islamic state. This is followed by an examination of the secular and Islamic status of Malaysian state. The study is divided into three sections. The first section, after a brief discussion on the nature of

2 The PAS cooperated with the National Justice Party (Keadilan), formed by former Deputy Prime Minister Anwar Ibrahim's wife Wan Azizah Wan Ismail, and the Democratic Action Party, made up largely of middle-class and working-class Chinese, forming a multiethnic alliance labelled the Barisan Alternatif, September 30, 2001.

secularism, examines the nature of an Islamic state in detail. It looks at the evolution of Islamic state in theory and practice, describes the innovations and the transformations it has undergone, and explains the consensus of the *ulama*^c on its essential features in the modern setting. This section, therefore, provides a framework to *analyse* the position of Malaysian state vis-à-vis secularism and Islamic state. The second section attempts to settle the question of the secular status of Malaysia. The third section analyzes the state of Malaysia from various angles to determine the validity or otherwise of considering Malaysia as an Islamic state. The findings of the study are summarized with pertinent observations in the concluding section.

Secularism and Islamic State: A Framework

There exists a variety of literature dealing with concepts of secularism and Islamic state. Yet the two concepts have remained somewhat vague. It is, therefore, essential to clarify these two concepts.

Secularism

The word secularism has been used in a variety of ways and within a number of different perspectives.³ In all major Protestant countries, it is used to refer to the policy of separating church from state. In Catholic countries, the preferred term is "laicism" which emphasizes the distinction of the laity from the clergy. Both terms, however, refer to two aspects of the same thing and hence used in connection with the problems of duality, opposition or separation of church and state. As a formal philosophical system, Jacob Holyoake first proposed secularism

3 The word secularism is derived from Latin *seaculum* meaning age or generation but in Christian Latin, it came to mean the temporal world. The word laicism is derived from Greek *Laos* (the people) and *laikos* (the lay). In all major Protestant countries, it is used to refer to the policy of separating church from state. In Catholic countries, the preferred term is "laicism" which emphasizes the distinction of the laity from the clergy. For a comprehensive account of secularism, see Eric S. Waterhouse, "secularism" in James Hasting (ed.), *Encyclopedia of Religion and Ethics* (Edinburgh: T.&T. Clark, 1954), Vol. xi, pp. 347-50.

about 1846 in England.⁴ Its most commonly regarded postulates are three: this-worldly orientation, Western science and liberalism. The first postulate sanctifies humanity as the ultimate reality and argues that the significance and ultimate aim of human beings should be sought with reference to the present life and social well-being without reference to religion or to the life in the Hereafter. Western science espouses a belief in the natural causation. The emphasis is upon reason, observation and experiment to the neglect of revelation, tradition or authority.⁵ Liberalism is founded upon humanism, a belief in the integrity and sanctity of the free individual and upon inherent human rights to life, liberty and pursuit of happiness. The ultimate claim of the liberal was religious and hence, the ultimate freedom emphasized was the freedom of the individual to profess the faith as the conscience called. As John Stuart Mill remarked:

“The great writers to whom the world owes what liberty it possesses, have mostly asserted freedom of conscience as an indefeasible right, and denied that a human being is accountable to others for his religious belief”⁶

By emphasizing the freedom of faith, the liberal creed has intended, in the words of Jefferson, “to erect a wall of separation between church and state”. From this standpoint, a secular state came to mean:

“A state in which government exerts no pressure in favour of one religion rather than another religion: a state in which no social or educational pressure is exerted in favour of one religion rather than another religion or no religion; a state wholly detached from religious (or irreligious) teaching or practice.”⁷

4 Owen Chadwick, *The Secularization of the European Mind* (Cambridge: Cambridge University Press, 1975).

5 Irving M. Zeitlin, *Ideology and the Development of Sociological Theory* (New Jersey: Prentice-Hall, Inc., 1968), pp. 3-7.

6 John Stuart Mill, *On Liberty* cited in Chadwick, *The Secularization of the European Mind*, pg. 27.

7 *Ibid.*

Western secularism was well received in the Muslim world. Some Muslim rulers applied this secularist model following either the authoritarian or liberal path to modernity. Mustafa Kamal Atatürk's scorched earth Westernization of Turkey in the 1920s exemplifies the authoritarian approach. Turkey was proclaimed a secular republic; European clothes and alphabets were made compulsory, and shrines and religious brotherhoods were closed. Resistance to these policies was met with repression, even death. Habib Bourguiba of Tunisia followed a gentler programme. He maintained Islam as the state religion but prohibited women from wearing the *hijab* (veil) and, in 1961, called upon the Tunisians not to fast in the month of Ramadan, in order, to fight underdevelopment. In both the cases, however, the seeds of secularism fell on barren ground as evidenced, in retrospect by active and organized Islamic movements for the last 20 years.

The second variant may be called Marxist secularism. Karl Marx argued that Western secular moral values "has dissolved personal integrity into exchange value ... torn off the veil of feeling and affection from family relationships and reduced them to purely financial connections."⁸ Hence Marx propounded a political and economic theory of the inevitable course of social development leading to the establishment of a classless society. He clothed his idea with the force of religious conviction and the certainty of apparently scientific proof. The end product is known as Marxism which "was the most powerful philosophy of secularization in the nineteenth century".⁹

The claims of Marxism, like those of western liberalism, are religious in their intensity. Whereas the West had thus far confronted religion only indirectly, Marxism assumed a militantly hostile attitude. Religion to Marx, is unreal; it is the product of man's ignorance of the scientific laws of causality and of his psychological weakness. It sets the stage for man's bondage and alienation and dehumanizes him by thwarting his captive

8 Karl Marx and Frederick Engels, *Manifesto of the Communist Party* (New York: International Publishers, 1948), pg. 11.

9 Chadwick, *The Secularization of the European Mind*, pg. 66.

impulses. Marxism was put into practice in the then Soviet Union, and in a modified form, in China. In these countries, systematic official attempts have been made to suppress religion as anti-social. In almost all left-wing societies, the tendency has been towards ideological monopoly. It means that these regimes carry out protracted and relentless campaigns to stamp out all religious faith in order to establish the Marxist dogma.

The final variant may be termed "positive secularism". This variant is better explained in the Indian context by Gajendragadkar's argument that:

"Indeed, Indian secularism recognizes both the relevance and validity of religion in human life.... In the context of the Constitution, secularism means that all religions practised in India are entitled to equal freedom and protection (emphasis mine)"¹⁰

Thus understood, secularism does not mean the absence of religion in the public arena. It simply means religious neutrality of the state, which is interpreted to mean equal opportunity for all religions for state patronage and for participation in public affairs. Two comments are in order. Firstly, neither India nor any other country espousing this brand of secularism adheres to it in practice. Secondly, it is erroneous to term a policy which accords centrality to religion as secular.

In the final analysis, secularism need not be viewed as antagonistic to faith nor as a synonym for atheism. Secularism is essentially the philosophy and practice of not letting governance be influenced by any one's faith (or the lack of subscription to any faith), particularly so in a plural society.

10 P.B. Gajendragadkar, "The Concept of Secularism", *Secular Democracy* (New Delhi, Weekly), Annual Number, 1970, pg. 1.

Islamic State

The concept of the nation-state or its Arabic equivalent *dawlah*, is a relatively recent development in Europe, as is the concept of sovereignty (*siyadah*). The nation-state system is generally linked to the Treaty of Westphalia in 1648, while the concept of sovereignty was first systematically enunciated by Jean Bodin (1530-1596) in 1576. It is natural therefore, that the concept of state (*dawlah*) is neither used in the Quran nor was it in vogue at the time of the Prophet (s.a.w.).¹¹ The early *fuqaha*^c (jurists) used the terms *Khalifah* or *imamah* to denote the idea of a political order. The term *dawlah* gained currency in the early seventh century A.H., and was employed with reference to the Muslim dynasties owing nominal allegiance to the powerless Caliph.¹² Another eight centuries had to elapse for the idea of an Islamic state to gain currency "as an alternative to the caliphate".¹³ The shift was occasioned by various factors including the abolition of the caliphate in 1924.

Although the term state or polity does not occur in the Quran, the essential elements that constitute a political order were referred to in the Quran which clearly indicates that the concept, if not the term, was meant in the Quran.¹⁴ For instance, the Quran refers to a set of principles or functions that either imply the existence of a socio-political order, or in some cases, the use of an organized authority for their realization.

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- 11 The word *dulah* occurs in the Qur'an (59:7) but is used in the sense of "circulation or making a circuit" where it is stated that the wealth should not circulate among the rich only. This usage is unrelated to the word state except perhaps figuratively to imply rotation (of political authority). Ahmet Davutoglu argues that the semantic transformation from the root "*dwl*" to "*dawlah*" occurred in three stages. First, it was used to denote the change of political power, next to denote continuity and for the ultimate political authority and, finally as nation-state. See Ahmet Davutoglu, *Alternative Paradigms: The Impact of Islamic and Western Weltanschauung on Political Theory* (Maryland: University Press of America, 1994), p.190.
- 12 Abu Ja'far Muhammad ibn Jarir al-Tabari, *Tarikh al-Tabari*, (ed.), M.J. De Geoe (Leiden: E.J. Brill, 1091), Vol.1, pp. 85-115.
- 13 Hamid Enayat, *Modern Islamic Political Thought* (London: The Macmillan Press Ltd., 1982), pg. 69.
- 14 Majid Khadduri, "The Nature of the Islamic State", *Islamic Culture*, Vol. 21, 1947, pg. 327.

They include things like *‘ahd* (contract), *amanah* (trust) *ita‘ah* (obedience) and *hukm* (adjudication).¹⁵ There are also general laws or directives, pertaining to the waging of war and the making of peace. The subjects of these laws or directives are “the justly balanced Muslim community” distinguishable from others by virtue of their possessing special characteristic, a self-sufficient political society. More importantly, there are certain religious obligations such as the collection of *zakah*, the punishment of criminals, the organization of *jihad* and so on, which may not be effectively accomplished without the formal intervention of political authority.

The Quran provides a number of important principles (See Table 1) pertaining to the Islamic political order. The first is *tawhid* meaning the indivisible, inalienable divinity of Allah s.w.t. This principle denies anyone, be it a human agency as with a Hobbesian Monarch, or a legal fiction in the form of a state, as with John Austin, the right to order others in his own right to do or not to do certain things. For, as the Quran declares, “*The command rests with none but Allah*” (6:57) *Who is the Lord of the universe* (1:1) *and grants guidance* (87:3).

Allah’s commands and directives have been bequeathed to mankind in two forms. The Quran, the divinely revealed book, from which all principles and ordinances of Islam are drawn; and the ideal conduct of the last Prophet (s.a.w.), the Sunnah, which clarifies, explains and exemplifies the Quran. The two taken together constitutes the Shari‘ah which is the ultimate source of authority. It means that all acts, procedures, dispositions and final decisions of the public authorities at any level cannot be valid and legally binding upon the people unless it is in conformity with the law. The Quran categorically enjoins the believers to “*judge between them by that which Allah has revealed*”, (5:49) and condemns the defaulters as “*unbelievers*”, “*wrongdoers*” and “*rebels*” (5:44, 45, 47). By upholding the Shari‘ah, Islam affirms the necessity of government on the basis of norms and well-defined guidelines, rather than personal preferences.

15 These concepts are defined in a legalistic format in Manzooruddin Ahmed, *Islamic Political System in the Modern Age: Theory and Practice* (Karachi: Saad, 1983), pp.27-43.

Table I: Essential Principles of the Islamic Political System

Principles	Meaning	Some Related Quranic Verses
<i>Tawhid</i>	Indivisible, inalienable divinity of Allah (swt)	1:2;3:154; 5:38-40; 6:102, 164; 7:3,54; 10:31; 12:40; 13:37; 15:36; 42:10; 48:4; 57:2-3; 112:1-4
<i>Shari'ah</i>	"The way to water hole. It is the Islamic law based on the Qur'an and the Sunnah.	5:48; 7:163; 42:13; 21; 45:18
<i>Adalah</i>	To establish justice.	4:58,135; 5:3,9,45; 7:29; 16:90,152; 42:15; 55:9
Freedom (<i>al-hurriyah</i>)	The right to do what one wants, within the confines of the <i>Shari'ah</i> , to achieve the maximum degree of self and collective realization.	2:286; 4:80; 10:99; 18:29; 74:39,56; 76:29; 81:28
Equality (<i>al-Musawat</i>)	Equal opportunity of each individual to articulate his/her potential to the maximum limit.	2:30; 4:1; 6:104,151; 12:40; 17:33
<i>Shura</i>	Consultation	2:233; 3:159; 42:38

The next principle is *Adalah*, to establish justice for all "even as against yourselves, or your parents or your kins, whether it be against the rich or poor" (Al-Quran 4:55; 4:135). The believers are commanded to be just for "justice is next to piety" (5:8). They are enjoined to observe the law and obey the representatives of Allah s.w.t who are appointed "to judge among men with justice" (38:24). The Prophets came with "the Book and the Balance (of right and wrong) that men may stand forth in justice" (57:25). The Prophet (s.a.w.) was commanded to rule in accordance with the "truth" and the "path of Allah" (2:24), the terms most commentators equate with "righteousness" and "justice" respectively. The Quran uses multiple words like *Sunnat*

Allah (the way or tradition of Allah), *mizan* (scale), *qist* and *‘adl* (both meaning justice) perhaps to emphasize the significance of justice. A just political order manifests itself in having upright and capable public officials managing the public policy in a just way and distributing wealth and opportunities in an equitable manner.

‘Adalah postulates two fundamental principles of freedom and equality. It is an essential condition and consequence of the establishment of justice that the people should be in possession of freedom “to act according to one’s own moral convictions, to make ideological or intellectual choices, and to take decisions on the basis of these convictions and choices.”¹⁶ The freedom espoused by Islam is not confined to believers but extends to minorities and non-Muslim citizens of the Islamic polity. The non-Muslim subjects have the freedom of preserving and practising their languages, religious practices and cultural traditions in an Islamic society. This freedom, it should be noted, is not absolute but relative and proportionate to man’s capacity and responsibility. Advocating absolute freedom is irresponsible as its complete denial is erroneous.

This freedom presupposes equality of all - equality in rights, liberties, opportunities and public duties. These are to be enjoyed by all irrespective of race, language and creed. There is no room for privilege under a system which subjects all equally to the identical law. The Quran recognizes no grounds for the superiority of individuals or nations to one another except that of moral rectitude and *taqwa* (49:13). According to Muhammad Asad, “it is in these principles and in these alone, that the concept of Islamic polity finds its meaning and justification.”¹⁷

16 AbdulHamid A. AbuSulayman, *Crisis in the Muslim Mind*, (tr.), Yusuf Talal DeLorenzo (Herndon Va.: International Institute of Islamic Thought, 1993), pg. 89.

17 Muhammad Asad, *The Principles of State and Government in Islam* (Gibraltar: Dar al-Andalus, 1980), pg. 33.

Finally, the Quran lays down the principle of *Shura* (consultation) guiding the decision-making process of the political system.¹⁸ The Quran directs Prophet Muhammad (saw) to “consult them in the conduct of affairs” (3:159) and refers to the believers as those who conduct “their affairs by mutual consultation” (42:38). The system of *Shura*, explains Abdul Hamid Abu Sulayman:

“... provides the procedure whereby Muslims sit together and deliberate upon important matters to arrive at and bound by conclusions in the light of the philosophical concept of justice. If the issue under consideration does not concern justice but a case of preferring one to the other, there is no harm in adopting measures such as voting, abiding by the point of view of the minority, etc.”¹⁹

According to the text and context of the Quran and the Sunnah, *Shura* means a decisive participation of the people in governing themselves. *Shura* ensures not merely the participation of the people in public affairs but it acts as a check against tyrannical rule as well. *Shura* can be operative only if there prevails the two fundamental principles of freedom and equality.²⁰ The essential feature of an Islamic political order, then, is that in it the government governs not merely by the law, but it reckons in all its decision with the wishes of the governed. Following Iqbal, it is possible to

18 The term *Shura* occurs in three places in the Quran in 2:233; 3:159; 42:38. Derived from *shawara*, *shawir* means to consult, to advise, beckon, suggest and *Shura* refers to consultation. Both al-Tabari and al-Qurtubi are of the opinion that consultation is a bliss and favour from Allah (s.w.t.) and that consultation is due “in matters not revealed”. See Abu Abd Allah Muhammad Ibn Ahmad al-Qurtubi, *Al-Jami' li-Ahkam al-Qur'an* (Beirut: Dar Ihya al-Turath al-'Arabi, 1958), Vol. 2, part 4, pg. 249, and al-Tabari, *Tafsir*, Vol. 3-4, pg. 100. It may be noted that *Shura* was thoroughly implemented during the time of the Prophet s.a.w and those of Abu Bakr and 'Umar ibn al-Khattab. This period may act as a reference point for the correct Islamic system. The *Shura* lost its original form during most of the period of Islamic history. Currently, *Shura* is receiving increasing attention but not much of application.

19 AbdulHamid AbuSulayman, “Islamization of Knowledge with Special Reference to Political Science”, *American Journal of Islamic Social Sciences*, Vol. 2, No. 2, 1985, pg. 285.

20 Ahmet Davutoglu, *Alternative Paradigms*, pg. 132.

say that the Islamic political order "is an endeavour to transform" the principles of *tawhid*, *‘adl*, equality, *Shura* and freedom "into space - time references, an aspiration to realise them in a definite human organisation."²¹

The Model Islamic Polity

The order referred to in the Quran took on form and substance in Madinah under the guidance and directives of Prophet Muhammad s.a.w. On the eve of his journey to Madinah was revealed fifteen verses of the Quran (17:23-37) which in a sense formed "the directive principles" to be used in erecting the first Islamic political order.²² A few months after arriving at Madinah the Prophet s.a.w drew up the first written Constitution of the world which provided the basis for the incipient Muslim polity.²³ The essentials of this Constitution can be summarised as follows:

- i. This Constitution was based on the agreement made by the Prophet s.a.w between the emigrants (*muhajirs*) and the helpers (*ansars*) and the Jews in Madinah.
- ii. It restructured political life in Madinah according to the Islamic conception of the Ummah (section 2).
- iii. Recognised the Prophet (s.a.w.) as the head of the new commonwealth (sections 23, 42) and defined his role as that of maintaining peace and order, arbitrating among groups in conflict; and of providing security from external attack (sections 37, 39, 40, 44).

21 Muhammad Iqbal, *The Reconstruction of Religions Thought in Islam* (Lahore: Sh. Muhammad Ashraf, 1971), pg. 155.

22 The divine order is neatly encapsulated in the fifteen verses of the Quran, all at one place (xvii: 23-37). Sayid Mawdudi labelled it "the Islamic Manifesto". Abdul Rashid Moten, *Islam and Revolution: Contributions of Sayid Mawdudi* (Kano, Nigeria: Bureau for Islamic Propagation, 1988), pp. 41-44.

23 See Muhammad Hamidullah, *The First Written Constitution in the World* (Lahore: Sh. Muhammad Ashraf, 1975), pp. 41-64.

- iv. It confirmed the principle of equality, rejection of tyranny and equal protection of the law even to the humblest of believers (sections 15, 17).
- v. It integrated the Jews into the body politic without depriving them of their religious and cultural freedom. They were obliged to contribute with the Muslims to the war expenses so long as it lasts.

As the religious and temporal head, the Prophet (s.a.w.) regulated social relations; enacted laws in the light of the Qur'an and enforced them; raised armies and commanded them;²⁴ and administered the territories in consultation with his companions. In fact, all important matters, not covered by divine revelation, were settled by the Prophet (s.a.w.) through the process of consultation.

The Constitution established a federation. The Jews were incorporated in the community as equals, with the same duties and privileges as other participants. Their sub-groups and clans were listed in details. Blood money, ransom of the prisoners, and the privilege of guaranteeing protection to others were left in the hands of tribes. The question of war and peace were the prerogative of the central authority. No group was allowed to sign a separate peace treaty with others. "They retained religious freedom as well as internal autonomy."²⁵ Commenting on the Constitution, Lichtenstadter wrote: "It shows an early comprehension of the necessity for social and political integration of minority groups into the body politic without depriving them of their religious freedom. It is remarkable that an Arab in the seventh century A. D. should have understood that."²⁶

24 The Prophet (SAW) commanded forces on 25 occasions although the actual fighting took place on nine occasions. See Mawlana Gauhar Rahman, *Islami Siyasat* (Lahore: Al-Manar Book Centre, 1982), pp. 189-193.

25 M. Hamidullah, *The First Written Constitution the World*, 18; 21.

26 Ilse Lichtenstadter, *Islam and the Modern Age* (New York: Bookman Associates, 1958), pg. 58.

The succession crisis resulting from the death of the Prophet s.a.w., without a designated successor, was resolved by the Ummah in accordance with their tradition and experience which conformed to the spirit of Islam. They resorted to a two-stage process of instituting a successor: (1) consultation, nomination and selection by the representatives of the Ummah (*bay'at al-khassah*), (2) and, subsequent confirmation by the public through general acclamation or *bay'at al-ammah*.

The first Caliph, Abu Bakr, was selected by the notables and confirmed by the general *bay'ah* in the year 11 A.H./632 C.E. The procedure was slightly modified in the case of the second Caliph. 'Umar ibn al-khattab was nominated by the incumbent in consultation with the leaders of the Ummah and was then referred to the general public for confirmation in 13 A.H./634 C.E. The procedure was amended once again in the case of the third Caliph. Uthman ibn Affan was nominated by an electoral college and subsequently ratified by the Ummah in the year 23 A.H./644 C.E. After the assassination of the third caliph and the ensuing chaos, the representatives of the Ummah approached 'Ali to assume the leadership position. 'Ali, however, insisted on the approval of the masses and was elected accordingly in the year 35 A.H./656 C.E.²⁷ These modes of succession were inspired by the Qur'anic principle of *Shura*. These have acquired a special significance and remained a basic principle of the Constitutional theory of an Islamic political order.

To be certain, the *khalifah* was not the prophet neither did he enjoy any metaphysical or theocratic privilege. He was responsible for upholding the religion against heretics and was entrusted with the function of the spiritual and material well-being of the Ummah. Obedience to the *khalifah* was conditional upon his obedience to Allah s.w.t. and His prophet s.a.w. Should he deviate from the Shari'ah, as announced by Abu Bakr in his inaugural speech, he forfeits the right to obedience. It means that the Ummah was to guide the *khalifah* in all his actions, to watch

27 For details, see al-Tabari, *Tarikh al-Rasul wa al-Muluk*, (Cairo: Al-Hussainiyyah Press, n.d), vols., 3-5; S. Abul A'la Mawdudi, *The Islamic Law and Constitution* (ed.), Khurshid Ahmad (Lahore: Islamic Publications Ltd, 1980), pp. 249-252.

out for any deviations from Islamic norms, to correct him if he “goes astray”, and to help him administer through good counsel.²⁸

The *khulafa* did exercise *ijtihad* to apply the Shari‘ah to new situations arising from the spatial expansion of Islam but always in conformity with given principles and in consultation with the members of the *Shura* council.²⁹ They ensured the rule of law, established separate judicial institutions and delineated rules of judicial procedure applicable to the governors and the governed alike. In his celebrated instructions to the judge of al-Basra, Abu Musa al-Ash‘ari, Khalifah ‘Umar stated three sources to be used in legal decisions: the Qur’an, the prevailing sunnah (i.e., the customary law), and reason. Thus he wrote: “Do not hesitate to change a decision previously taken by you, once you realize that it was not equitable. This is better than to persevere in error. Be guided by reason.”³⁰ In this spirit, ‘Umar suspended the Qur’anic sanctions against robbery during famine, because conditions were abnormal.

28 See Al-Baqillani, *Al-Tauhid* in Ibish Yusuf, (ed.), *Nusus al-Fikr al-Siyasi al-Islami* (Beirut: Hayat Press, 1966), pg. 56; also Taqi al-Din Ibn Taymiyyah, *Al-Siyasah al-Shar‘iyyah fi Islah al-Ray wa al-ra‘iyah* (Egypt: Dar al-Kitab al-Arabi, n.d.).

29 Two cases (of Usamah’s expedition and ridda or apostasy war) have often been cited of Abu Bakr having defied the ‘unanimous opinion of his advisers. (Mawdudi, *Islamic Law and Constitution*, pg. 246). In the case of Usamah’s expedition, Abu Bakr was acting according to the established principle that the *Shura* is not required or binding on things for which clear injunctions exist either in the Qur’an or in the Sunnah. In permitting Usamah to proceed on his military campaign, the caliph was simply carrying out the decision of the Prophet (s.a.w.) who organized the expedition and appointed Usamah as its commander. Abu Bakr could not, in his own words, “fold up the flag unfurled by the Prophet himself” nor could “dismiss a man (Usamah) appointed by the Messenger of Allah”. (Cited in Dr. Majid Ali Khan, *The Pious Caliphs* (London: Diwan Press, n.d.), pp. 332-33). As for Abu Bakr’s determination to fight those who committed apostasy and refused to pay zakah in the public treasury, he did not defy the opinion of the *Shura*. Rather he, with the help of ‘Umar b. al-Khattab who was convinced of the soundness of the caliph’s stand, argued the case and won the hearts of the members of the *Shura* and “afterwards to his fighting the apostates.” (Muhammad S. El-Awa, *On the Political System of the Islamic State* (Indiana: American Trust Publications, 1980), pg. 5. Even Mawdudi agrees that the companions had “ungrudgingly accepted” the Caliph’s decision not because of “the right of veto of the Caliph” which contrary to Mawdudi’s contention, he certainly did not have, but because of their “absolute faith in his deep Islamic insight and wisdom (Mawdudi, *Islamic Law and Constitution*), pg. 246

30 Khalifa Abdul Hakim, *Islamic Ideology* (Lahore: Institute of Islamic Culture, 1961), pg. 215.

Umawi and 'Abbasi Rule

With the expansion of the community, explains Ibn Khaldun, the group feeling (of the Arab) approached its final goal, royal authority. The restraining influence of religion had weakened.³¹ The *Khilafah* was transformed into the *mulk*, a change from *siyasaḥ diniyyah* to *siyasaḥ aqaliyyah* supported by *'asabiyyah* in seizing power. Muawiyah ibn Abu Sufyan, the founder of the Umawi caliphate (41-142 A.H/661-750 AD), introduced hereditary monarchy by appointing his son, Yazid, as his successor. This act, as suggested by Hasan al-Basri, had the corrupting influence on the subsequent political life of the Ummah.³² The egalitarian community headed by its elected, pious caliph had now become an empire ruled by a hereditary caliph who wielded absolute power. The principle of *al-Shura* was muzzled and an Arab warrior aristocracy assumed the responsibility for the unity and stability of the Umawi caliphate. This has resulted in an increasingly autocratic and absolutist government.

The institution of caliphate eroded further with the advent of the Abbasid rule (132-646 A.H/750-1258), which was characterized by hereditary succession, ostentatious court ceremonies and central administrative organizations controlling a vast area extending from the Atlantic to central Asia. By the middle of the tenth century, political fragmentation and weakening of the caliphate was setting in and army commanders began asserting their independence as rulers of semi-autonomous states. As the effective power of the caliphs declined, the military commanders became the sultan exercising de facto rule over the emerging political entities. Finally, in 656/1258, the Mughals under Hulagu, laid seige over the Abbasid capital, Baghdad, and razed it to the ground.

31 Ibn Khaldun, *The Muqaddimah: An Introduction to History* (ed.), N.J. Dawood (Princeton: Princeton University Press, 1981), pg. 166.

32 Jalal al-Din Abd Rahman ibn Abu Bakr al-Suyuti, *Tarikh al-khulafa* (Beirut: Dar al-Thaqafah, n.d.), pg. 224.

The termination of the ʿAbbasid caliphate meant in effect, splintering the unity of the Ummah which was administered by a universal caliphate. The political unity of the caliphate gave way to a burgeoning number of Muslim sultanates that governed an extensively large area. By the sixteenth century, three major Muslim sultanates had emerged: the Ottomans in the Near East and Eastern Europe; the Safavids in Persia; and the Mughals in India. These sultanates had to adjust to regional and local conditions and traditions, but overall, Islamic tradition continued to govern the world of Islam. Religious toleration towards non-Muslim subjects was a remarkable feature of the Islamic spirit of equality and justice to all.

Of the three Muslim sultanates, the Ottoman was perhaps the most powerful entity in the Muslim world and certainly the longest-lived.³³ The Caliph assumed the role of defenders of faith and guardians of the Shariʿah. Nevertheless, the Ottoman caliphate resembled Ibn Khaldun's *mulk* having a mixed Constitution with the Shariʿah as its foundation supplemented by the ordinances of the king which had secular overtones. The Ottoman law was a mixture of Shariʿah and *qanun* (the canons or political and administrative ordinances of the caliph). Gradually, the secular forces gained currency among the intellectuals and, after the defeat of Turkey in the First World War; they led a successful struggle against the caliphate. In 1924, the caliphate was abolished and Mustafa Kamal (Ataturk) founded a secular Turkish republic.³⁴

Currently, Muslim world is divided into about 47 states. They vary in terms of structure, ideology, and social base, often circulating between military and civilian rule and in essence remaining authoritarian. Sometimes the secular regimes were based upon the military (Egypt, Libya, Mali, Niger, Nigeria, Algeria, Bangladesh, Indonesia, Pakistan, Sudan), while others relied on a central, secular party like the Ba'athists (Tunisia,

33 See I.Metin Kunt, "The Later Muslim Empires" in Marjorie Kelly (ed.), *Islam: The Religious and Political Life of a World Community* (New York: Praeger, 1984), pg. 127.

34 For details of the process of disintegration of the Ottoman caliphate, see Alan R. Taylor, *The Islamic Question in Middle East Politics* (Boulder: Westview Press, 1988), 23-25. For the step-wise abolition of the caliphate, see Hamid Enayat, *Modern Islamic Political Thought* (London: The Macmillan Press Ltd., 1982), pp. 52-55.

Iraq, Syria, and Senegal); finally, building upon alliances formed during indirect rule, some regimes institutionalized autocratic monarchical forms, combining Western technical support. About half of the Constitutions of these states (26 to be exact) proclaim Islam as the official state religion. Yet, the Shari'ah is not the law of the land in any country.

Early Jurists and Thinkers

From the various developments outlined above, it is clear that the governing institution has undergone several transformations and has widely diverged from the ideal - the Madinah model. These divergences and controversies surrounding the caliphate are reflected in the works of Muslim jurists and thinkers. The Orientalists in their attempts in magnifying the differences have glossed over the common grounds which united these thinkers of different historical periods. Muslim scholars were convinced, that the Madinah model represented the ideal; that the purpose of political authority is to guarantee the maintenance of Islam and the execution of the Shari'ah which obligates *Shura* and *'adl*; that politics should not be separated from ethics and morals; and that there should be no tension between religion and politics. As a matter of fact, politics has been conceived by these jurists and thinkers as a necessary extension of religion and morals.³⁵

Historically, the only form Islamic polity assumed after the death of the Prophet (s.a.w.) is the *Khilafah* system. The Muslim thinkers therefore developed an elaborate doctrine concerning the origin of the idea of caliphate, the qualification of the caliph, the nature and mode of election and the purpose of government. On the question of the necessity of imamate or caliphate, majority of thinkers including the Shi'ah, the Khawarij and most of the Mu'tazilah believe that the *Imamah* is compulsory because of the functions assigned to it by the revealed law. They, however disagree as to the reason for its necessity. Al Ash'ari, al-Baghdadi (d. 429A.H./1037A.C.), Abul Hassan al-Mawardi (364-450A.H./974-1058A.C.) and Abu

35 Enayat, Modern Islamic Political Thought, pg. 2-4.

Hamid Muhammad al-Ghazali (450-505A.H./1058-1111 A.C.), among others, consider that the *imamah* is demanded by revelation, not by reason.³⁶ The Mu'tazilah, on the other hand, held the view that the necessity of *Imamah* is proved by reason and not by revelation. Ibn Taymiyyah argues, however, that the administration of the affairs of men is demanded by reason no less than revelation. To this, he adds, that there is a natural propensity inherent in man which drives him to cooperate with his fellow beings for common well-being and happiness. This common welfare cannot be attained without social order and the latter requires some authority to direct it.³⁷ This sociological argument had been developed in greater detail by Ibn Khaldun.

Muslim political thinkers and jurists began their expositions from the assumption that Islamic government is based upon Shari'ah which does not distinguish between religion and other aspects of life and that there is no area of man's activity and concern to which Shari'ah does not address itself with specific guidance. The political authority and its internal organization were defined by referring to this law.

The basis of the political authority was the *Ummah*, the Islamic social order. The ruler, known in the early literature as *khalifah*, *imam*, *amir* etc., is not the sovereign but a *primus inter pares*, first among the equals. Within the *Ummah*, the governor and the governed are on an equal footing. There is no distinction of rank but of role and no basis of ranking save that of *Taqwa*. The *Imam* must administer according to the Shari'ah, the violation of which absolves the *Ummah* of its obligation to render obedience to him.

The purpose of government is very clearly spelled out: the defence of Islam and the establishment of conditions in which the believer could fulfill his true destiny. Al-Mawardi explains the purpose of an Islamic political system as a continuation of the prophetic function in "the

36 See Abdul Qadir al-Baghdadi, *Al-Farq Baina al-Firaq* (Beirut: American University of Beirut, 1966); Abu Hasan Ali ibn Muhammad Al-Mawardi, *Al-Ahkam al-Sultaniyyah* (Cairo: Maktabah al Bali al-Halabi, 1973).

37 See Ibn Taymiyyah, *al-Siyasah al-Shar'iyyah*.

defence of faith and administration of the world."³⁸ Ibn Taymiyyah adds that the greatest goal of the political authority is to make sure that Islam as a religion and a way of life extends to all of life and humanity and that "Allah's words be supreme".

The appointment of an *imam* is considered obligatory and obedience to him incumbent as long as his policies did not contravene the Shari'ah. This is so, explains al-Ghazali, because the *imam* maintains order, symbolizes collective unity of the Ummah and its historical continuity and finally, he derives his authority from the Shari'ah. In the words of Ibn Taymiyyah (d. 728/1328) "The people have no option but to have a rulership whether pious or sinful. People asked him: "We understand the pious, but why bother for the sinful? He said: [Because] thanks to it, highways are kept secure, canonical penalties are applied, holy war is fought against the enemy, and spoils are collected."³⁹ There is disagreement, however, on the method whereby the *imamah* is established. Al-Mawardi, Abu Y'ala and al-Baghdadi, for instance, speak of election by the notables (Abu Bakr's case), designation by the incumbent ('Umar's case), nomination by an electoral college (Uthman), and direct election by the people ('Ali) as the valid forms of instituting an *imam*. Imam Ghazali, in whose time the government was "a consequence solely of military power" declared that: "whosoever he may be to whom the possessor of military power gives his allegiance, that person is the caliph." Badr al-din Ibn Jama'ah (639-733A.H./1244-1333 A.C.) later on concretised it by declaring the forcible acquisition of power (i.e., the military power) as yet another valid form of installing a caliph. Thus, the early jurists and thinkers displayed greater flexibility in adapting their ideas to political realities. They extended a type of de facto recognition to the prevailing, arbitrary order on the plea of preserving the unity and stability of the ummah and of maintaining the authority of the Shari'ah.

38 Al-Mawardi, *Al-Ahkam al-Sultaniyyah*, 6; also E.I.J. Rosenthal, *Political Thought in Medieval Islam*, pg. 28.

39 Taqi al-Din Ahmad Ibn Taymiyyah, *al-Siyasat al-Shar'iyyah* (Cairo, 1951), 173 cited in Hamid Enayet, *Modern Islamic Political Thought*, pg. 15.

The chief executive must also be endowed with qualities which would enable him to fulfill his responsibilities. Consequently, it is difficult to find a single Muslim scholar of note who has not dwelled at length on the virtues of the chief executive.⁴⁰ In the list of qualities, the predominant role of justice and its ethical sanctions are quite clear. This vision is diametrically opposed to the one espoused by political realists like Machiavelli who had a great impact upon the development of Western political theory. The just *imam* is described by some of the jurists as the shadow of God upon earth. He preserves equality between the people, promotes their welfare and redresses the grievances of the oppressed. In short, a just *imam* would establish conditions in which the right religion and Islamic virtues be practised. Obedience to the just ruler is therefore mandatory and is equated with obedience to Allah s.w.t and His prophet (s.a.w).

Contemporary Muslim Thinking

The demise and the impossibility of resuscitating of the universal caliphate in 1924 precipitated a vigorous debate among Muslim scholars on the nature and function of the caliphate. What is new under the changed situation was a re-definition of the concept of *Khilafah* and an elaboration of the structure of the Islamic political order. Beginning with Imam Ibn Taymiyyah, the new trend is evidenced in the writings of Hasan al-Banna, Sayyid Qutb, Abul A'la Mawdudi, Hassan al-Turabi and others. Their ideas have deeply affected the consciousness of Muslims around the world and hence require a brief recapitulation.

Plurality: To begin with, contemporary Muslim thinkers do not treat *Khilafah* as a historical institution to be replicated in its entirety. They idealize the rule of *khulafa al-rashidun* as a paragon of Islamic government and society which, as Ibn Taymiyyah argues, cannot be recreated in history. Nor do they subscribe to the indispensability of political universalism or a universal *Khalifah*. Instead, they accept the plurality of

40 Leonard Binder, "Al-Ghazali's Theory of Government", *The Muslim World*, vol.45, No. 3, (1955), pg. 236; Rosenthal, *Political Thought in Medieval Islam*, pp. 29, 40, 236.

the Muslim world as a necessity. They argue that since the Ummah is, by definition, non-territorial and encompasses the whole world, plurality of political units is inevitable. "There is no imperative, therefore", argues Ibn Taymiyyah, "to press the world of Islam into a political unity or federal state; it can better develop through the principle of cooperation, into a confederation of free sovereign states."⁴¹ Sayyid Mawdudi similarly argued for the unity of the Muslim world in 1965.⁴²

To these thinkers, *Khilafah* denotes a system which aims at the welfare of the humanity through the implementation of Islamic values and principles. In short, *Khilafah* may be defined as a socio-political system in accordance with the teachings of Islam.

Sayyid Abul A'la Mawdudi defined the Islamic political system as "nothing more than a combination of men working together as servants of Allah to carry out His will and purpose".⁴³ Since the system is founded upon the Islamic vision and communal needs, it maintains some dynamism and "...has room for scores of models which are compatible with the natural growth of a society and the new needs of the contemporary age as long as the total Islamic idea dominates these models in its expansive external perimeter."⁴⁴

Constitutional Government: The Islamic political system is a Constitutional system founded upon the conditions underlined by the Shari'ah which is a complete system of life and all-embracing

41 Qamaruddin Khan, *The Political Thought of Ibn Taymiyah* (Islamabad: Islamic Research Institute, n.d), pg. 184.

42 See Abul A'la Mawdudi, *Unity of the Muslim World* (Lahore: Islamic Publications Ltd., 1967).

43 Sayyid Abul A'la Mawdudi, *The Process of Islamic Revolution* (Delhi: Markazi Maktabah Jamaat-e-Islami, Hind, 1970), pg. 9.

44 Sayyid Qutb, *Maarakat al-Islam wa al-Rasmaliyyah* (Beirut: Dar al-Shuruq, 1975), p.66. Quoted in Yvonne Y. Haddad, "Sayyid Qutb: Ideologues of Islamic Revival" in John L. Esposito (ed.), *Voices of Resurgent Islam*, (New York: Oxford University Press, 1983), pg. 71.

social order.⁴⁵ The Shari'ah, according to Mawdudi, touches upon such matters as "religious rituals, personal character, morals, habits, family relationships, social and economic affairs, administration, rights, and duties of citizens, judicial system, laws of war and peace and international relations...."⁴⁶

Shura:

The Shari'ah specially recognizes the authority of the *Shura* in arriving at communal decisions and upholds the principles of freedom, justice and equality of all Muslims regardless of their ethno-national and racial distinctions.

Fusion of Powers:

The Shari'ah does not specify the structural and functional features of the political system. This dynamism, inherent in the Shari'ah, permits the Ummah to evolve any suitable method for the enforcement of Islamic law provided these methods do not contravene Shari'ah injunctions.⁴⁷ Consequently, Muslim scholars suggested the principle of fusion of powers as the method best suited to realise the will of Allah (swt). This doctrine according to Muhammad Asad, "constitutes a most important, specifically Islamic contribution to political theory."⁴⁸ The fusion of powers requires overlapping executive, legislative and judicial branches of government which perform mostly shared functions of enacting

45 The idea of a written Constitution for the Islamic political system has its origin in the Constitution of Madinah enacted by the Prophet (s.a.w.). In general, the Muslim rulers did not introduce written Constitutions and ruled through decrees and executive orders. Contemporary scholars like Rashid Rida, Mawdudi and others advocate for a written Constitution. Mohammad Hashim Kamali, "Characterisitics of the Islamic State", *Islamic Studies*, Vol.32, No.1, Spring 1993, pp.26-27.

46 Mawdudi, *Islamic Law and Constitution*, pp.217-219.

47 Justice Javed Iqbal, "The Concept of State in Islam" in Mumtaz Ahmad (ed.), *State, Politics and Islam* (Indianapolis: American Trust Publications, 1986), pg. 47.

48 Asad, *The Principles of State and Government in Islam*, pg. 52.

authoritative rules, mapping out policies, enforcing the rules and settling disputes arising from the rules enacted.

The Executive:

The executive "branch is the nucleus of authority and the active force in the government."⁴⁹ It is designated in the Qur'an and the *hadith* as *ulul amr* and *umara* and is headed by the *Amir* (the leader) who will be elected from among the "most respectable" and "most pious" persons. The leader must, in addition to piety, be knowledgeable and a capable administrator. The chief executive is subject to the rule of law in exactly the same way as other members of the community.

Elections:

The *Amir* does not hold his position in his own right or because of his linkage with a family or a tribe but rather as a trustee of the Shari'ah and the affairs of the Ummah. Monarchy would then be unacceptable because there is "no place for kingships in Islam and succession could not be on a hereditary basis."⁵⁰ Although the principle of *Shura* establishes election for succession to rule, it does not specify the method of election. The Ummah, consequently, is free to determine the method of election - direct, indirect, proportional etc. - provided these methods are consistent with the letter and spirit of the Shari'ah.

Legislature:

The *Amir* works in consultation with the legislature which is considered by contemporary scholars as manifesting the concept of *Shura*, *ijtihad* and *ijma'*. The caliphate began, according to Hassan al-Turabi, as an "elected consultative institution. Later it degenerated into a hereditary, or usurpatory, authoritarian government."⁵¹ This consultative or legislative assembly must be restored and, according to Muhammad Iqbal, it must

49 Abdulrahman Abdulkadir Kurdi, *The Islamic State: A Study Based on the Islamic Holy Constitution* (London: Mansell, 1984), pg. 90.

50 See Godfrey H. Jansen, *Militant Islam* (New York: Harper and Row, 1979), pg. 173.

51 Hassan al-Turabi, "The Islamic State" in John L. Esposito (ed.), *Voices of Resurgent Islam* (New York: Oxford University Press, 1983), pg. 243.

have the right to interpret and apply the law (*ijtihad*) which would then constitute the authoritative consensus of the community (*ijma'*).

Most scholars argue that the legislature should constitute representatives, at least, the majority of whom must be elected. It must contain a group of experts in various fields including Islamic jurisprudence. The legislature would perform the executive and deliberative functions.⁵²

The Judiciary:

The judiciary, called *Qada*, is independent of the executive and is to adjudicate in strict accordance with the Shari'ah. The Ulama convention stipulated in their suggested Constitution that "the judiciary shall be separate from and independent of the executive so that it may not be influenced by the executive in the discharge of its duties"⁵³ The executive and the judiciary are both bound by the same law. As Turabi argues,

"He (the ruler) enjoys no special immunities and can, therefore, be prosecuted or sued for anything he does in his private or public life. This is a fundamental principle of Islamic Constitutional law, ensuing from the supremacy of the Shari'ah."⁵⁴

The function of judiciary includes, inter alia, settlement of disputes, prevention of wrongful acts and issuing of declaratory judgements.⁵⁵ There is some disagreement about its power of judicial review. Some modernist thinkers would not permit the judiciary to possess the power to judge the Constitutionality of the laws. Instead, they would restrict the role of the judiciary to seeing that the laws, as framed, are carried out according to

52 See, *The Islamic State*, pp. 77-79.

53 Ibid., pg. 334.

54 Hassan al-Turabi, "The Islamic State, pp. 248-49.

55 See Kurdi, *The Islamic State*, pp. 85-87 for details.

the intentions of the legislature.⁵⁶ Hasan al-Turabi holds the contrary opinion and considers that "judges, as guardians of the Shari'ah, adjudicate in all matters of law."⁵⁷ This viewpoint is echoed by Muhammad Asad and elaborated by Abdulkadir Kurdi.⁵⁸ To Sayyid Mawdudi, even though the judiciary did not exercise such powers during the period of *khulafa al-rashidun*, the lack of people of "a very deep and true insight in the Qur'an and the Sunnah" makes it imperative "to give the judiciary power to declare void and ultra vires of the Constitution all laws and legislations enacted in contravention of the Qur'an and the Sunnah."⁵⁹ This stand was endorsed by the leading ulama of Pakistan, Muhammad Asad, as well as the Ansari Commission report.⁶⁰

Form of Government:

Contemporary scholars are unanimous in their opinion that the Qur'an and the Sunnah do not prescribe any particular form of government, nor elaborate a Constitutional theory. Consequently, it is argued that the Islamic polity can take many forms, "it is up to the Muslims of every age to find one that suits them".⁶¹

Muhammad Asad prefers the presidential form of government as it corresponds to the idea of the caliph. The Ansari Commission discussed the problem in detail and suggested that one person should hold the position of head of state as well as head of government - as is the case in a presidential form of government.⁶² Hassan al-Turabi has no objection to

56 Kamal A. Faruki, *The Evolution of Islamic Constitutional Theory and Practice* (Karachi: National Publishing House, 1971), pp. 72-73.

57 Hassan al-Turabi, "The Islamic State", pg. 249

58 Kurdi, *The Islamic State*, pp. 86-87.

59 Mawdudi, *The Islamic Law and Constitution*, pg. 228.

60 See *ibid.*, 347-348; Ansari Commission Ki Report, pg. 51.

61 Asad, *The Principle of State and Government in Islam*, pg. 23.

62 Ansari Commission Ki Report, pp. 12-15.

“whatever form the executive may take”, provided the leader “always be subjected both to the Shari‘ah and to the *ijma*‘ formulated under it.”⁶³ Furthermore, “no rigid theory of separation of government functions can develop in a comprehensive, coherent system like the Islamic political order, except to provide some necessary checks and balances to safeguard liberty or justice.”⁶⁴

The principles, values and the structural features outlined above make it clear that Islamic polity cannot be categorised as either parliamentary or presidential democracies. Islamic polity caters for man’s welfare in this world as an adjunct to his salvation in the Hereafter. The scope of an Islamic political system is wide and goes beyond the worldly affairs of the people. The key characteristic of an Islamic polity is the continuing responsiveness of the government to the will of Allah (s.w.t.) as well as to the preferences of its citizens as long as these preferences do not violate the principles of Shari‘ah. In addition to providing peace, order and good government for the healthy existence and development of individuals, the Islamic polity is under obligation, in the words of the Qur’an, to “... establish the system of *salat* (worship and prayers) and *zakat* (purification-tax), enjoin right and virtue and forbid wrong and evil. With Allah rests the end (and decision) of (all) affairs.” (22:41)

Is Malaysia Secular?

In the light of the discussion on secularism, it is clear that the Marxist variant does not apply to Malaysia. Religion to all Malaysians is very much real. Malaysian leaders realized that Marxist secularism is out of question. Consequently, the ongoing debate on secularity of the state is predicated upon the Western model of secularism. Applying this variant, too, Malaysia cannot be labeled a secular state.

The word “secular” does not appear anywhere in the Constitution of Malaysia. The Constitutional Commission, 1956-1957 reported that the Commission received memorandum submitted by the Alliance asking

63 Hassan al-Turabi, “The Islamic State”, pg. 248.

64 Ibid., pg. 249.

to include a provision in the Constitution declaring Islam to be the religion of the federation. However, it contained a proviso that "The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the State is not a "secular State" (Emphasis mine).⁶⁵ The Commission rejected the proposal and when it finally agreed to insert a state religion clause it refrained from entering the word "secular" in the Constitution.

Those who consider Malaysia to be secular refer to the court decision delivered by Lord President Tun Saleh Abbas in the case of *Che Omar Che Soh v Public Prosecutor* [1988] 2 MLJ 55. This case argued for invalidating the mandatory death penalty for drug and firearms offences under the Fire Arms (Increased Penalties) Act as being contrary to Islam. Since the Constitution declares Islam to be the official religion of the federation, the imposition of death penalty on these offences, not being a hudud or qisas, is contrary to Islamic law and therefore unconstitutional. The counsel's submission was rejected on the ground that "the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law."⁶⁶ In this case, the Court took a historical approach in construing article 3(1) of the Federal Constitution and gave priority to the secular law. It did not declare that the Constitution was secular. The Constitution explicitly recognizes the validity and applicability of Islamic law in the country. Interestingly, in *Meor Atiqulrahman bin Ishak and others v Fatimah bte Sihi and others* [2000] 5 MLJ 375, Justice Mohd Noor Abdullah referred to the legislative history in the enactment of article 3(1) of the Constitution. He, however, was of the opinion that article 3(1) of the Constitution obligates the Government to protect and promote Islam as best as it could.⁶⁷ He upheld

65 Kevin YL Tan and Thio Li-Ann, *Tan, Yeo & Lee's Constitutional Law in Malaysia and Singapore* (Singapore: Butterworths Asia, 1997), pg. 968.

66 *Ibid.*, pg. 886.

67 Farid Sufian Shuaib, Tajul Aris Ahmad Bustami, Mohd. Hisham Mohd Kamal, *The Administration of Islamic Law in Malaysia: Text and Material* (Kuala Lumpur: *Malayan Law Journal*, 2001), pg. 3.

the argument that the school regulation prohibiting pupils from wearing the headgears, which is valid according to Islamic law, is contrary to article 3 and article 11 of the Constitution and is therefore null and void. This judgment evidently gave preference to religion as against the secular law.

It has also been argued that the secularity of the state is evident in the statements made by the first Prime Minister and has not been changed since then. In 1958, in his response to the question of implementing Shari'ah, the Prime Minister categorically stated that "this country is not an Islamic state as it is generally understood; we merely provide that Islam shall be the official religion of the State."⁶⁸ The ruling party explained "that the intention in making Islam the official religion of the Federation was primarily for ceremonial purposes, for instance to enable prayers to be offered in the Islamic way on official occasions such as the installation of the Yang di-Pertuan Agong, Merdeka Day and similar occasions."⁶⁹ Similar sentiments were echoed within the bureaucratic elite. For instance, Malaysia's first Lord Chief Justice, Mohamed Suffian Hashim, once wrote: "For many generations, the various ethnic groups in Malaya have lived in peace and harmony and there was no overwhelming desire that the newly independent state should be an Islamic state."⁷⁰ Academicians like Rosenthal likewise argued that "amid the strains and stresses inherent in such a mixed population, an Islamic state based on an Islamic ideology would not be the most appropriate institution."⁷¹ The successors to the first Prime Minister, Tun Abdul Razak and Tun Hussein Onn, did not depart much from the earlier policy of emphasizing the rituals without

68 Official Report of Legislative Council Debates, 1st May 1958, Columns 4631 and 4671. Also cited in Ahmad Ibrahim, "The Position of Islam in the Constitution of Malaysia" in Mohamed Suffian (Tun), H. P. Lee, and F. A. Trinidad, eds., *The Constitution of Malaysia: Its Development, 1995-1997* (Kuala Lumpur: Oxford University Press, 1978), pg. 55.

69 Ibid., pg. 49.

70 M. Suffian Hashim, "The Relationship Between Islam and the State in Malaya", *Intisari*, Vol. 1, no. 1, 1962, pg. 9.

71 E. I. J. Rosenthal, *Islam in the Modern National State* (Cambridge: Cambridge University Press, 1965), pp 287-288.

committing the public policy to realize the Shari'ah objectives. They were guided, as pointed out by the third Prime Minister, by Allah's commandments, the dictates of reason and the interest of the nation. Once again the statements are couched in negative terms. The Prime Ministers and other responsible authorities simply denied the intention of the Constitution framers in establishing an Islamic state. They did not affirm or declare that Malaysia was a secular state. On the contrary, they affirmed the role of Islam in the state structures even if that role is confined to ceremonies. Political scientist G. P. Means did apparently concede that Malaysia was not secular. He, however, repeatedly postulated a decline of Islam's role in the political development of Malaysia, claiming its eventual eclipse at the hands of secular, pragmatic and rationalist Muslims.⁷²

It would therefore be a mistake to call Malaysia a secular state. It may be argued, on the contrary, the Malaysian state "regulates" religion in the interest of promoting peace and tranquility in the plural society. Malaysia has never been a secular state. It does not separate the state from religion or religious obligations. It does not confine the functions of the state to mundane matters and does not leave religion entirely in the hands of religious establishments. The Constitution declares Islam to be the religion of the Federation and on occasions the state funds religious activities. Tan and Li-ann, therefore, consider Malaysia to have a "Confessional Constitution."⁷³

The Constitution framers and the practitioners recognized that strict adherence to the Western model of secularism through the erection of an "impassable wall" between religion and politics would result in their total rejection by the deeply religious populace of their respective countries. Therefore, the word 'secular' does not appear anywhere in the Constitution. Rather than creating an impassable wall, the Constitution

72 See G. P. Means, "The Role of Islam in the Political Development of Malaysia", *Comparative Politics*, Vol. I, No. 2, 1969, pp. 282-283; and his "Public Policy Toward Religion in Malaysia" *Pacific Affairs*, Vol. 51, No. 3, 1978, pg. 387.

73 Tan and Li-Ann, Tan, Yeo & Lee's *Constitutional Law in Malaysia and Singapore*, pg. 884.

in Article 160(2) declares Islam to be the religion of the federation. However, it restricts its application only to Muslims and only in areas outlined in item 1 of List II of the Ninth Schedule. The Constitution does not declare Shari'ah to be the law of the land. But by the same token, the Constitution does not declare it to be a secular state. Here religion is seen as having an important role to play in society. Islam in Malaysia is regarded as moderate as it is willing to co-exist with other religions, is open-minded and believes that democracy is a natural political system. Human rights, including equality of women, are very much part of the teachings of Islam. Muslims also think that the private sector and the market place should be the defining factors of the economy, but that social justice is important for the market system to be acceptable. The Constitution carries a definition of "Malay" which emphasizes that for a person to be a Malay he must be a Muslim. "Malay" was made the national language of the state. The Yang di Pertuan Agong is required to include in his oath of office a statement that he will at all times protect the Muslim religion. Special privileges for the Malays are included in the Constitution and there are provisions for the Malay regiment and Malay reserve land.

Is Malaysia an Islamic State?

It is evident that the Federal Constitution does not declare Malaysia to be a secular state. Nevertheless, Malaysia was considered a secular state simply because the Prime Minister declared that it was not an Islamic state. Things began to change with the appointment of Dr. Mahathir Mohamad as the Prime Minister of Malaysia in 1981. The Prime Minister, from the very beginning, was genuinely concerned about the infusion of universal Islamic values and principles in the administration of government. Equally noticeable was his intention to base his administration on Islamic principles of legitimacy. In 1988, he started referring to Malaysia's Islamic government and pioneered the policy of Islamizing government. By early 1990s, projection of Malaysia as an Islamic state had increasingly gained credibility in the eyes of scholars like Syed Hossein Nasr, Ismail R. Al-Farouki, Fazlur Rahman, Sheikh Muhammad Al-Ghazali, Yusuf

al-Qaradhawi and the Sheikh al-Azhar Mohammad Sayed Tantawi.⁷⁴ By then, Malaysia was hailed as a rare example of a Muslim country with “an adequate simultaneous grasp of Islam and modernity, and initiatives taken in that light.”⁷⁵ The only thing required by then, according to some scholars, was to implement *Hudud* (laws and punishments pertaining to stealing and robbery, adultery, accusing others of adultery, consumption of alcoholic beverages, and apostasy) and to formally declare Malaysia to be an Islamic state.

The Declaration

Immediately after the September 11, 2001 incident, at a time when Muslim leaders were shying away from associating themselves with anything “Islamic”, Mahathir openly defended Islam as a progressive and a peaceful religion and on September 29, 2001, he shocked the world by declaring that “Malaysia is an Islamic country.”⁷⁶ The Barisan Nasional Supreme Council meeting held on October 5, 2001, endorsed the Prime Minister’s declaration. A day later Mahathir said that there was no need for a debate on the issue, announcing that the leaders of the BN component parties were “comfortable” with the current concept of Malaysia as an Islamic state.⁷⁷ Subsequently, there were many statements in the English, Chinese, and Malay press by leaders of the component parties of the ruling coalition that they had no problems with the announcement, accepting it with an open heart. The Prime Minister’s declaration was made on the basis that significant elements of the country’s legal and administrative system had Islamic foundations. The rising prominence of Islam in the economic, educational and Constitutional spheres were also taken into account. This unequivocal

74 New Straits Times, March 24, 1997.

75 R. K. Khuri, *Freedom, Modernity and Islam – Toward a Creative Synthesis* (Syracuse: Syracuse University Press, 1998), 6.

76 New Sunday Times, September 30, 2001.

77 The Sun, October 6, 2001.

declaration was made after a three-hour “Muzakarah Daulah Islamiyah” (Islamic State Discussion or Discourse) with seventy religious leaders, academics, Islamic scholars, and dakwah (mission) activists at UMNO headquarters on 3rd August 2001. Chaired by Tan Sri Abdul Hamid Othman (the Religious Advisor to the Prime Minister), this muzakarah session concluded that Malaysia qualified as an Islamic state since the Umayyad and Abbasid caliphates.⁷⁸ On 4th August 2001, it was announced that “a nationwide programme to explain to the people that Malaysia has fulfilled the requirements of an Islamic State will be held as soon as possible.”⁷⁹

In February, 2002, at the World Economic Forum special session in New York, the Prime Minister stated:

Islam is not just a religion. It is a way of life. It should bring about peace, stability and success. It is a way of life which does not neglect spiritual values. It is a way of life which can bring greatness to the followers of Islam, as it once did. If today Islam is perceived to be a religion of backward, violent and irrational people, it is not because of Islam itself as a faith and a way of life. It is because Muslims have deviated from the fundamentals of Islam, have abused the teachings in order to justify their personal greed and ambitions.⁸⁰

In the same meeting he declared:

“Actually Malaysia is already an Islamic country. The state religion is Islam and Muslims can practise their religion and apply the Shari‘ah laws as family laws. All the religious needs of Muslims are provided by the Government. At the same

78 New Straits Times, August 4, 2001.

79 Ibid.

80 Mahathir Mohamad, “Ulama‘ have distorted Islam”, a speech delivered at the World Economic Forum Special Session on “The Role of Islam in the Modern State” in New York. New Straits Times, Monday, February 4, 2002.

time non-Muslims are free to practise their religions because this is permitted by Islam."⁸¹

This declaration should be considered a milestone in the country's political history. With this declaration, Malaysia in principle took the shape of an Islamic state. It is the intention and its formal expression contained in the declaration by the Prime Minister, the highest ranking authority in Malaysia, which is decisive.

Justifying the Islamic Declaration

Indeed, the justification for the declaration of Malaysia being an Islamic state came from the Prime Minister himself. According to him:

"The majority of people in this country are Muslims. Muslims are in power. The power held by Muslims is not to oppress non-Muslims. Instead, when Muslims are in power, they must rule fairly. Although Islam is the official religion, followers of other religions are free to practise their religions. This is in line with teachings of Islam."⁸²

Datuk Dr. Rais Yatim justified it by saying that provisions (Articles 3 and 11) in the Federal Constitution, the Shari'ah Court system prevalent in the country, and the power of Sultans over administration of Islamic justice clearly point to the fact that Malaysia is an Islamic country. Even in the judiciary, especially the application of Shari'ah law, Malaysia has gone a long way from the Tunku's days.⁸³

There are also studies justifying Malaysia as an Islamic state. The study by Wan Zahidi Wan Teh is well worth considering.⁸⁴ It declares,

81 Ibid.

82 New Sunday Times, September 30, 2001.

83 New Straits Times, Monday, October 8, 2001.

84 Dato Wan Zahidi Wan Teh, *Malaysia adalah sebuah Negara Islam (Malaysia is an Islamic State)* (Kuala Lumpur: Jabatan Hal Ehwal Khas, Kementerian Penerangan Malaysia, 2001).

first, that Malaysia is an Islamic state simply because it satisfies the definitional criteria of an Islamic state. By referring to several scholars, it defines an Islamic state as the one where the governance and the defence of the territory is in the hands of Muslims; or as a peaceful country under the control of Muslims; or a territory in which the laws of an Islamic ruler or *hukum fiqh* (the laws of Muslim jurisprudence) are enforced. Secondly, Malaysia also qualifies as an Islamic state by virtue of its fulfilment of all of the obligatory responsibilities despite few shortcomings. These responsibilities, borrowed from Al-Mawardi, include preserving the purity of religion, instituting executive, legislative and judicial branches for smooth running of administration, establishing institutions to facilitate prayers, organize pilgrimage (*hajj*), collect *zakah* and other forms of taxation, to suppress crime and punish criminals and to ensure that moral and religious injunctions of the Shari'ah are carried out.⁸⁵

Ustaz Abd. Manaf follows a similar line of agreement.⁸⁶ He argues that there is no universally agreed list of criteria or what he calls "*hukum qat'i*" to typify a political system as Islamic. This contention was also expressed rather forcefully by Shad Saleem Faruqi.⁸⁷ Therefore, the Islamicity of a state, argues Ustaz Abd. Manaf, has to be based upon *ijtihad*. Malaysia, he argues, recognizes Islam as its official religion, recognizes Allah (swt) as the sovereign, the Prime Minister represents the people and Shura is practised through the parliamentary system. Thus considered, Malaysia is an Islamic state and its Constitution is not in conflict with Islam. Datuk Haji Mohd. Nakhaie analysed the Malaysian state from an Islamic perspective. According to him, Malaysia recognizes Islam officially as the religion of the Federation and the government has consistently been working towards achieving the Islamic ideals. Malaysia has a Constitutional monarch elected by the conference of rulers for a 5

85 Abu al-Hasan Ali ibn Muhammad al-Mawardi, *Al-Ahkam al-Sultaniyah wa al-Wilayat al-Diniyah* (Cairo: Maktabat al-Anjal al-Misriyah, 1966).

86 Ustaz Abd. Manaf Haji Ahmad, *Malaysia Negara Islam: Perlembagaan Tidak Bercanggah Dengan Islam* (Kuala Lumpur: Yayasan Dakwah Islamiah Malaysia, 2000).

87 Shad Saleem Faruqi, "Facing a Problem of Semantics", *The Star*, October 28, 2001.

year period. The Prime Minister, the chief executive, is elected by the people and is chosen from the majority members of parliament. Despite Malaysia being multi-cultural and multi-ethnic, power is in the hands of Muslims. Islamic values are visible in politics, culture, law and economy even though there are shortcomings. Finally, the parliamentary system practised in Malaysia is closer to *Mushawarah* (consultative) system approved in Islam.⁸⁸

There are other collections dealing with the concept of Islamic state in Malaysia.⁸⁹ These studies have contributed greatly towards clarifying the concept. Unfortunately, they are narrowly focused leaving out many other factors that deserve serious consideration. Most of these studies do not fully substantiate the claims the authors have made. Finally, the Islamic state debate is conducted largely in Malay language. The objections to the concept or to the Prime Minister's declaration are usually found in English language.

Shari'ah: the Islamic Legal System

It has generally been argued that in an Islamic state Shari'ah should reign supreme. Islamic state has been described as a nomocracy which upholds the Shari'ah. One may disagree with the application of the term nomocracy, the centrality of Shari'ah in an Islamic state is agreed upon by all scholars.

Malaysia is a federation of 13 states and 3 federal territories with a parliamentary government. The Independence Constitution envisaged a multi-ethnic Malaysia because of its "highly variegated ethnic mix that makes it one of the prime examples of a multi-racial society in the

88 Datuk Haji Mohd. Nakhaie Hj. Ahmad, *Kenegaraan Malaysia Dari Perspektif Islam* (Kuala Lumpur: Yayasan Dakwah Islamiah Malaysia, 2000).

89 See Khairul 'Azmi Mohamad and Abdul Monir Yaacob (eds.), *Pelaksanaan Hukum Syarak di Malaysia* (Johor: Pejabat Menteri Besar Johor, Ketua Penerangan dan Penyelidikan Kerajaan Negeri Johor); Khairul 'Azmi Mohamad and Faizal Fadzil (eds.), *Konsep Pembangunan Ummah Dalam Islam: Perspektif Malaysia* (Johor: Pejabat Menteri Besar Johor, Ketua Penerangan dan Penyelidikan Kerajaan Negeri Johor).

whole world".⁹⁰ Malaysia contains three main racial groups of whom a little over one-third are Chinese and Indians. By 1997, 59.70% of the 16.5 million population of Peninsular Malaysia were *Bumiputra* (sons of the soil), essentially Malays; 28.27% were Chinese and 9.34% were Indians, or more specifically from the subcontinent. If we add Sabah and Sarawak, Malaysia's Borneo states, the indigenous peoples make up 61.91% of the population.⁹¹ This plural condition was formed through British immigration policies during colonial rule, from the late 18th century to 1957, when independence was granted, and it was concretized in an ethnic division of labour with Malays in state bureaucracy and agriculture, Chinese in commerce and tin mines and, Indians in plantations.⁹²

Malays have considerable cultural homogeneity. Malays are orthodox Muslim of the Shafi'ite school, their language is Malay, and they have their own social systems and customs. Of the current population, the Chinese are the most heterogeneous. Most of them confess to one or more of the three great religions of Mainland China – Buddhism, Taoism or Confucianism. Similarly, the Indians are culturally divided and their cultural diversity may be identified with their ancestor's places of origin. An overwhelming number of Indians profess Hinduism.

The Constitution of Malaysia reflects this pluralism. The Constitutional provision (Art. 95B) for, what may be called, "legal pluralism" (the provision to establish native court systems in addition to the existing common law and Shari'ah law) aims at protecting the heritage of distinct cultures throughout Malaysia. This is the prime reason why Shari'ah does not have a clear status of supremacy in the Malaysian Constitution. Shari'ah is also not an independent law neatly entrenched in the Constitution under an article or a clause. Rather it owes its existence to various clauses in the Constitution.

90 Information Malaysia 2000: Yearbook (Kuala Lumpur: Berita Publishing Sdn. Bhd., 2000), pg. 74

91 Ibid.

92 See Clive S. Kessler, "Archaism and Modernity: Contemporary Malay Political culture," in Joel S. Kahn and Francis Loh Kok Wah, eds., *Fragmented Vision: Culture and Politics in Contemporary Malaysia* (Sydney: Allen and Unwin, 1992), pp. 140-41.

The Shari'ah related provisions of the Constitution of Malaysia are as follows:

- 3(1): Islam is the religion of the Federation; the other religions may be practised in peace and harmony in any part of the Federation. Thus in defining Islam as the religion of the Federation, the Constitution safeguards freedom of religious expression.
- 11 (1): "Every person has the right to profess and practise his religion and subject to clause 4, to propagate it.
- 11(4): State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law, may control and restrict the propagation of any religious doctrine among persons professing the religion of Islam." Thus, proselytization among Muslim peoples is forbidden but this does not apply in reverse.
- 12(2): "It shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose."
- 74(2): Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

The Ninth Schedule List II State List of the Federal Constitution states as follows:

Except with respect to the Federal Territories, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and

intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay custom. Zakat Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place or worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List: the Constitution, organization and procedure of Shari'ah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

121(1A): "High Courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts." Thus, this article protects Shari'ah courts against interference by High Courts.

160(2): "... Malay means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom...." Thus, the concept of Malay is inextricably tied up with observance of the religion of Islam. Malay special rights are therefore, recognized as bearing a religious qualification.

All State Constitutions in Malaysia prescribe that the Ruler of the state must be a person of the Islamic faith. Some State Constitutions require that the Menteri Besar and state officials like the State Secretary shall profess Islam. Except for Sarawak, Islam is the official religion in all states.

Many of the States, including the Federal Territories, have enacted legislation relating to Islamic law. Such legislation includes:

- (i) The Administration of Law Enactment, which provides for the three important institutions such as: (1) the Council of Muslim Religion; (ii) the Mufti; and (iii) the Shari'ah Courts, which are organised in three layers, the Shari'ah Subordinate Court, the Shari'ah High Court and the Shari'ah Court of Appeal.
- (ii) The Islamic Family Law Enactment, which deals with the Islamic family law in respect of marriage, divorce, maintenance, guardianship and other matters connected with family life.
- (iii) The Criminal Procedure Enactment for the Shari'ah Court.
- (iv) The Civil Procedure Enactment for the Shari'ah Court.
- (v) The Evidence for the Shari'ah Court.

All these enactments refer to the administration and implementation of the Islamic law. In some of them it is specially provided that any provision of the enactments which is inconsistent with the Islamic law shall to the extent of such inconsistency be void; and in the event of any lacuna or in the absence of any matter not expressly provided for the enactment, the court shall apply the Islamic law.

Notwithstanding the above mentioned articles and clauses, it has often been argued that Article 4(1) makes the Constitution and not the Shari'ah the supreme law of the federation. Article 4(1) reads:

This Constitution is the supreme law of the Federation and law passed after Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency, be void.

Professor Ahmad Mohamed Ibrahim argues that Article 4(1) affects only the written law and even then it affects the validity of any law passed after Merdeka Day. He argues that "the Constitution cannot affect the validity of the Shari'ah which is non-written and is certainly not passed after Merdeka Day, although it may affect the legislation relating to the administration of Islamic Law."⁹³ It has also been argued that Islamic Law is not recognized in Malaysia as it is not included in the definition of law in Article 160 of the Constitution. To Ahmad Ibrahim, such a reading of the Constitution is "negative". He takes a positive attitude and contends that "the definition of the law uses the term includes and so can be extended to embrace the Islamic Law." Furthermore, Ahmad Ibrahim argues that "Islamic Law is clearly recognised by the Constitution as it is mentioned in List II of the Ninth Schedule."⁹⁴

Shari'ah Institutes

In addition to the above, the government of Malaysia has introduced certain Shari'ah institutes into the public domain such as Islamic Banking Scheme (1982), Islamic Insurance (Takaful)(1985), Islamic Accepted Bills (equivalent to Bankers Acceptance) and Islamic Expert Refinancing Scheme (1990). Interest-free banking system was also made available to the conventional banks (1993). These Shari'ah modes of transactions are not imposed upon the citizens. Rather, they are offered as alternatives. In such a situation, the non-Muslim owned financial institutions are allowed to trade under the shari'ah principles and they do that.

93 Ahmad Mohamed Ibrahim, *The Administration of Islamic Law in Malaysia* (Kuala Lumpur: Institute of Islamic Understanding Malaysia, 2000), pg. 397.

94 *Ibid.*, pg. 398.

The Electoral System

Contemporary Islamic thought understands Islam as prescribing, first, that the government be by consultation; second, the government be by the more competent, the more fit to rule; and finally, that the government be responsible. How does the Islamic government of Malaysia fare in this respect?

The Malaysian political system has all along been characterised by a multi-ethnic coalition, which began in 1949 with the establishment of the Communities Liaison Committee.⁹⁵ However, the idea of inter-ethnic cooperation at the elite level became institutionalized in 1954 with the formation of the Alliance Party comprising the United Malays National Organization (UMNO), the Malayan (later Malaysian) Chinese Association (MCA) and subsequently joined by the Malayan (later Malaysian) Indian Congress.⁹⁶ The May 1969 election reverses for the Alliance followed by terrible race riots in Kuala Lumpur signalled the end of the Alliance. It was followed in 1974 by the formation of a new political organization, the Barisan Nasional (BN – National Front), made possible by the presence of a relatively unified, mutually respectful, multi-ethnic elite whose leading members could mobilize “their” respective communities.⁹⁷

The BN effectively controls the political decision-making process and governs according to mandates received from the voting public at regularly held national elections in 1974, 1978, 1982, 1986, 1990, 1995 and 1999. Though the BN dominates the political scene, opposition parties have been contesting elections regularly, and balloting and counting procedures

95 The Committee was formed on January 10, 1949 “with six Malay and six Chinese members and one Indian, Ceylonese, Eurasian, and European member each, and the attendance of the British Commissioner General, Malcom MacDonald” Diane K. Mauzy, *Barisan Nasional: Coalition Government in Malaysia* (Kuala Lumpur: Marican & Sons, 1983), pg. 12.

96 See *Ibid.*, pp. 12-37 for the formation and the operation of the Alliance Party.

97 See Karl Von Vorys, *Democracy without Consensus: Communalism and Political stability in Malaysia* (Princeton: Princeton University Press, 1975).

have been fairly performed. As an approved motion in the parliament states: "Malaysia gives its citizens the freedom to choose their own leader and government through the process of a free and democratic election".⁹⁸ Unlike some Western democracies, however, the official election campaign period is usually short lasting between 10 - 14 days. Furthermore, there is a government ban on organising public rallies and conducting mass processions. While the parties are permitted to display posters and billboards, they are required to obtain a permit for putting up posters. They also had to adhere to several conditions governed by the Local Government Act 1976. For instance, they are not allowed to paste posters on trees, buildings, road signs, public phone booths or streetlights. Similarly, campaign panels and structures could not be placed or erected at pathways and nearby shops. In short, there exist officially prescribed limits on public participation and public discourse, especially on issues deemed sensitive to inter-ethnic relations. The political elite in Malaysia consider these "mild" restrictions essential to prevent the multiethnic society from being torn asunder. They will not risk the unity of the country and its development under the ambit of liberal democracy.

Elections have been reasonably fair. The Home Ministry, containing the Registrar of Societies, has usually permitted opposition parties to form and has resisted meddling in their internal affairs or obstructing their recruitment of members. While outdoor rallies have been proscribed since 1969, ostensibly in order to prevent any recurrence of the serious ethnic rioting that took place in that year, the police often grant permits for outdoor *ceramah* (political meetings) during the campaign period. The opposition has full access to its own papers, the Internet and a busy foreign press. In addition, the government has rarely resorted to outright vote-buying. The government has avoided any systematic deployment of goons and "muscle-men" to menace opposition supporters. Finally, there has been little evidence of ballot-box stuffing, deliberate miscounting, or false reporting. Indeed, final results have usually been made known the day after elections have taken place. Consequently, opposition parties have vigorously contested Malaysia's general elections and in the 1999

98 Ibid., Thursday, November 20, 1997.

elections the opposition defeated individual BN candidates, doubled its strength to about 25 percent of federal parliamentary seats and an opposition party, PAS, retained control of the Kelantan state government and took over the state government of Terengganu. As Prime Minister Mahathir Mohamad pointed out, "And this happened repeatedly. No legal action was taken to prevent opposition party representatives from taking their place in Parliament as in some countries".⁹⁹ In the 1999 elections, 427 candidates contested the 193 seats of House of Representatives. Of these candidates, 205 belonged to various opposition political parties, 193 contested under the banner of the BN, and the rest contested as independent candidates. The voter turn out was about 73.45 percent; the opposition parties obtained 42.41 percent of the popular votes and won 45 seats.

Accountability

Malaysia operates a parliamentary system. As argued above, Islam does not lay down any definite and detailed form of government to be followed by Muslims. The only requirement is that the leader be subject to the Shari'ah and the *Ijma'* of the Ummah. In the parliamentary system adopted in Malaysia, the government is carried on in the name of the head of the State, Yang di Pertuan Agong, by ministers who enjoy the confidence of the majority in parliament and are responsible to parliament for all their public acts, both individually and collectively. The Yang di Pertuan Agong appoints the Prime Minister who is "a member of the House of Representatives who in his judgment is likely to command the confidence of that House"(Art. 43(2)(a)) and other ministers "on the advice of the Prime Minister" from among the members of either House of Parliament"(Art. 43 (2)(b)). The Constitution contains the accountability clause. Article 42(3) states that "The Cabinet shall be collectively responsible to Parliament." This is called ministerial responsibility and it is this responsibility that gives to the Malaysian political system the name of a responsible government. In it the ministers are responsible to the

99 Speech by Prime Minister Mahathir as UMNO president at the opening of the annual general assembly of UMNO at Kuala Lumpur. See New Straits Times, Friday, June 22, 2001.

legislature for all their official acts and they remain in office as long as they retain its confidence. It also means that whereas the cabinet is collectively responsible to the parliament for its policies, a minister can be removed from office for his or her individual indiscretion or for acts of omission and commission and the Yang di Pertuan Agong exercises his pleasure on the advice of the Prime Minister.

Shura and Fusion of Powers

The Malaysian political system is characterized by “co-mingling” of the executive and legislative functions. There is no separation between the executive and legislative powers as that which forms the distinguishing mark of the Presidential system. On the contrary, there is a close and intimate inter-dependence of both the executive and the legislative departments. Muhammad Asad emphasized that an Islamic political system should be founded on a fusion of the executive and legislative powers and, at the same time, upon the maintenance of harmonious relations between them. The members of the cabinet are members of the parliament as well as heads of the executive departments of the government. They are responsible for defining the broader lines of national policy, collectively constituting the government, and running the administration. They resolve, initiate and pilot in parliament legislation which they deem essential for carrying out their policy. The Ministers must always be prepared to answer the questions put to them while the parliament is in session, impart all information which members consider necessary to elicit from the government, and defend their official conduct.

The essence of the responsible government is its solidarity, a common front, and it becomes binding on every member of the cabinet, and of course, on every Minister outside the cabinet, to pursue an agreed policy for which all accept responsibility and on which they stand and fall together. It becomes incumbent upon the government to take decision after due consultation in the cabinet. Once a decision is taken in the cabinet, it has to be explained, and defended in the parliament which has the ultimate responsibility to accept or reject the policy. This requires, on the part of the elite, to have a belief in the method of peaceful persuasion, in the ultimate reasonableness of man, and his response to rational

arguments. It means that there should prevail a sense of give and take; the habit of tolerance and compromise. Shura is nothing but a process of arriving at a collective decision after due consultation with cabinet colleagues and members of parliament.

The Malaysian political system characterized by permanent coalition is ably suited for practising Shura which is extended even to non-Muslims. The ruling front was comprised originally of nine political parties but subsequently broadened its base by inviting other political parties to join the coalition. This strategy helped reduce narrow politicking and gave the government a broader electoral base. Other positive consequences of the politics of accommodation has been summarised by Harold Crouch as follows:

“Although dominated by its Malay component, the presence in the government of parties representing the Chinese and Indian communities, as well as the indigenous communities of East Malaysia, means that the Malaysian government lacks the unity of purpose of a truly authoritarian regime. The government’s need for multi-communal electoral support ensures that it is responsive to at least some of the demands of the non-Malays who therefore have an interest in the preservation of semi-democratic representative institutions.”¹⁰⁰

Yang di Pertuan Agong

It may be argued that Chapters 1 and 2 and other related provisions of the Constitution dealing with the supreme head of the federation are objectionable from an Islamic perspective. However, it must be remembered that the Malaysian monarchy is a unique institution. There is no record in human history where a King is required to seek election of some kind; he is required to hold office for a fixed period of five years; and

100 Harold Crouch, “Malaysia: Neither Authoritarian nor Democratic”, in K. Hewison, R. Robinson and G. Rodan (eds.), *Southeast Asia in the 1990s: Authoritarianism, Democracy and Capitalism* (Sydney: Allen and Unwin, 1993), pg. 153.

is required to relinquish the office if charged with an offence. According to Article 32(3):

The Yang di Pertuan Agong, shall be elected by the Conference of Rulers for a term of five years, but may at any time resign his office by writing under his hand addressed to the Conference of Rulers or be removed from office by the Conference of Rulers, and shall cease to hold office on ceasing to be a Ruler.

Thus he is elected every five years unlike the traditional system where the Monarch ascends the throne through lineage and remains until his abdication or death. Under the Constitution, the King takes precedence over all persons in the Federation. The office of the King is not hereditary but is for a fixed term of five years and on a rotational system among the Rulers. The Third Schedule of the Constitution provides for the order in which the nine Rulers are entitled to be appointed as the King. When a Ruler is elected, he has to relinquish his tenure of office and functions as Ruler of his own State and may appoint a Regent instead. However, he remains as Head of Islam in his State and approves any amendments to the State Constitution.

The Constitution also provides for the appointment or election of the Deputy King; he exercises no power but will immediately fill the post of the King in the latter's absence or disability. However, he does not automatically come to the throne in the event of the King's death or resignation. He takes over until a new successor is elected by the Conference of Rulers.

The position of the King is that of a Constitutional Monarch. He does not have absolute powers except certain powers conferred by Parliament on him under Federal Laws provided in the Federal Constitution. Except for a few matters where he is allowed to use his discretion, he can only act on the advice of the Prime Minister. His authority covers that of the appointment of the Prime Minister, cabinet ministers and deputy ministers and ministerial functions. The legislative authority is vested in a parliament consisting of the King, Dewan Negara and Dewan Rakyat.

The King has the power of pardon, according to Article 42, which is considered objectionable under Shari'ah. As explained by Ahmad Ibrahim, "... in the present context of Malaysia, this applies only to ta'zir offences and does not enable the Yang di Pertuan Agong to pardon offences which are subject to hudud."¹⁰¹

Freedom and Equality

Malaysian political system, as explained by Mahathir Mohamad, "accords the freedom to choose representatives of the people, and by extension, the government."¹⁰² Certainly, it does not belong to the group that worships democracy as an end in itself. The government considers democracy, as a means to choose a government and the latter is duty bound to determine what constitutes public good and to govern accordingly. The government may be wrong in its interpretation, in which case the people has the right to change the government through elections.

Malaysia believes in the rights and freedom of the individual, the community and the people as a whole. Part II of the Federal Constitution provides for the fundamental liberties including equality before the law and to equal protection of law; freedom of religion, speech, assembly, and association; rights to property and rights in respect of education. However, as Mahathir puts it,

"Freedom must be predicated on the need to avoid denying the freedom of others within society. Thus while workers must have the freedom to strike against their employers, their actions should not result in a high degree of discomfort for the general public... Just as the individual is given the right to object to the noise of construction or the development in its neighbourhood, the society must have the right to object to individuals who offend the sensitivities of the society. ...

101 Ahmad Mohamed Ibrahim, *The Administration of Islamic Law in Malaysia*, pg. 398.

102 Mahathir Bin Mohamad, *The Malaysian System of Government*, pg. 46.

And so the practice of blatant homosexuality or nudity or vandalism will not be permitted in Malaysia.... It is right for the people to criticize or even attack the government on whatever issues but violent attempts to topple the Government or instigating violence against the Government will not be permitted in Malaysia. If the Government is unpopular or oppressive, the election process can be used to unseat it.”¹⁰³

Mahathir was, in a sense, explaining the overall objectives of the Constitution, which is geared at protecting the paramount interest of the community. The Constitution does provide individual rights but in case of conflict between individual interests and public interest, it gives prominence to the interest of the larger public. To quote Mahathir again: “The exercise of personal freedom under our democratic concept is possible but it must not result in the loss of the freedom of other members of the community or the community as a whole”.¹⁰⁴ This conception of striking a fine balance between the individual and community interest is in accord with Islam.

To give prominence to societal interest does not mean subjecting the individuals to human rights abuses. Consequently, the Parliament passed a legislation (Human Rights Commission of Malaysia Act 1999, Act 597) establishing a Human Rights Commission (known with its acronym SUHAKAM) to promote awareness of human rights, making recommendations to the government on legislative and administrative directives and advising it on subscription or accession of treaties and other international instruments in the field of human rights and to inquire into complaints regarding infringements of human rights.¹⁰⁵ On 3rd April 2000, the Government announced the appointment of SUHAKAM’s first

103 *Ibid.*, pp. 92-93.

104 *Ibid.*, pg. 45.

105 Human Rights Commission of Malaysia, *Annual Report 2000* (Kuala Lumpur: Percetakan Wtan Sdn. Bhd., 2001), pp. 5-8.

chairman and 12 other members of the Commission. Musa Hitam, known for his critical remarks about the government, was appointed as the first chairman against his wish. He wrote: "It was the PM who appointed me ... as chairman of SUHAKAM. This is in spite of my written and verbal decline of the post. I am convinced thus, that he was serious about human rights and I expressed this appreciation often enough during SUHAKAM's road shows and my talks".¹⁰⁶ Malaysia's decision to establish SUHAKAM, it is alleged, was to some extent aimed at pre-empting mounting external pressures associated with the United Nations' global review of human rights in 1993. This diplomatic rationale evoked a skeptical reaction from human rights activists. However, the quality and independence of the Commission's work are now widely acknowledged, though doubts remain as to its capacity to overcome deep-rooted structural obstacles in implementing human rights. The Commission enjoys good access to information and co-operation from relevant authorities, based on the high status and background of its membership. In terms of operating style, it has tended to adopt the role of advisor and a mediator, albeit without authority to enforce its decision. SUHAKAM has recommended that peaceful assemblies be permitted but was quick to reiterate that in supporting freedom of assembly, it was opposed to any form of violence, be it domestic, street or institutional. The head of the Commission's Law Reform Working Group emphasized: "We acknowledge that peace and stability are paramount and public order needs to be maintained at all times."¹⁰⁷

In short, Prime Minister Mahathir Mohamad and other leaders see Western understandings of both human rights and democracy as associated with a dominant liberal-individualist ideology. Malaysian government claims that it broadly accepts democracy and the universal human rights but their intensity has to be toned down to ensure national unity, stability and development. Without peace and stability, Mahathir pointed out, the Government would not be able to concentrate on

106 See A. Kadir Jasin, "Other Thots", *New Sunday Times*, July 15, 2001.

107 *New Straits Times*, Saturday, August 4, 2001.

developing the country. "Instead it will have to focus on countering internal and external threats and the funds to be used for development will have to be channelled for something else."¹⁰⁸

Looking at the experiences of other Muslim countries, Mahathir's argument sounds logical. The government has succeeded in realising its objective of letting "Malays to hold their own in Malaysia and for Malaysia to hold its own in the world". Economically, its decade long uninterrupted economic growth had transformed it "from the relative pessimism of the 1980s to the overflowing optimism of the 1990s".¹⁰⁹ By the end of 1999, it was also evident that most of the NEP's goals had been achieved. Although the target of 30% control of corporate wealth by the Malays was not achieved, the figure had risen from 1% in 1970 to about 20.6% in 1995 and 19.1% in 1999.¹¹⁰ The highest proportion of Bumiputra equity ownership was in the agriculture, construction and transportation sectors. However, Bumiputra ownership of corporate equity in the manufacturing sector was 12.5% in 1999. Poverty had been trimmed down to a remarkable 6.1 percent nationwide in 1997, in contrast to its figure of almost 50 per cent in Peninsular Malaysia in 1970. The seventh Malaysia Plan envisaged a reduction in the incidence of hard core poverty to 0.5% and of general poverty to 5.5% by the year 2000. Efforts to reduce poverty were hampered by some reversals during the economic crisis in 1997-98.¹¹¹ Yet the economic gains are appreciable. To quote Mahathir,

The whole country, and not only in the cities, has electricity and water, mosques, clinics, hospitals, schools, roads, tarred roads in the villages. Not only are locals employed but two million foreigners are given

108 Ibid., August 7, 2001.

109 Khoo Boo Teik, *Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamad* (Kuala Lumpur: Oxford University Press, 1995), pg. vii.

110 See Malaysia, Economic Planning Unit, Prime Minister's Department, *Seventh Malaysia Plan, 1996-2000* (Kuala Lumpur: Percetakan Nasional Malaysia Berhad, 1996), 81; also idem, *Eighth Malaysia Plan, 2001-2005* (Kuala Lumpur: Percetakan Nasional Malaysia Berhad, 2001), pg. 56. *Asia Times* (Bangkok), 7 May 1996.

111 *Eighth Malaysia Plan, 2001-2005*, pg. 56.

employment opportunities, in this country. There is no shortage of food or clothing. Even the poor are provided with comfortable houses.¹¹²

The government has also succeeded in overcoming the mid-1997 economic and financial crisis through its own non-conventional approach and, more importantly, without the assistance of International Monetary Fund and the World Bank. The Government's stimulative fiscal policies and selected capital controls helped Malaysia to "revive its economy such that in the Year 2000, the economy grew rapidly, much faster than the growth rates of countries which had received their assistance".¹¹³ The decade long strong economic growth averaging over 8 percent annually was contracted by 7.5 percent in 1998. The economy began to recover in 1999, during which it posted a 5.8 percent growth rate.

Multiplicity of Associational Life

Malaysian ethnicity is equally matched by a vibrant associational life. This is not something new. Elements of a civil society were found in the pre-colonial period. *Waqf* and *Qariah* management committees and mystical groups (*turuq*, sing. *tariqah*), for instance, had their own independent existence. During the colonial period, various Malay, Chinese and Indian associations pursued their activities free from the control of the colonial bureaucracy. Since independence, trade unions and voluntary organizations, apart from political parties, have multiplied manifold and operate within their own space. As of December 31, 1998, there were 29,574 registered societies in the country, with 56,626 branches all over the country. These societies claim a membership of over 200,000 of whom only 60,000 are active in the administration of the societies.¹¹⁴ Some of these associations are not civil societies. Some of these are organised by the government as conduits for development funds and state largesse.¹¹⁵ Others are fully autonomous and independent of the

112 *New Straits Times*, Friday, June 22, 2001.

113 *Ibid.*

114 *New Sunday Times*, February 21, 1999.

115 Kamaruddin M. Said, *The Despairing and the Hopeful* (Bangi: Penerbitan Universiti Kebangsaan Malaysia, 1993), pg. 97.

state. They may receive some financial and technical support from the government; they are nevertheless voluntary associations organised by the people for promoting certain causes, issues or interests.

In general, associations can be categorised as environmental groups, consumer groups, human rights groups, development groups and women's groups. Among the major actors are Aliran, a Penang-based group oriented towards non-communal politics, the Malaysian Bar Council, the National Human Rights Association (known as HAKAM), Voice of Malaysia (Suara Malaysia or SUARAM), Angkatan Belia Islam Malaysia (Malaysian Islamic Youth Movement, ABIM), Consumers' Association of Penang (CAP), Federation of Malaysian Consumer's Association (FOMCA), Institute for Social Analysis (INSAN), the Just World Trust, the All Women's Action Society (AWAM), and the Selangor Graduates Society (SGS). These associations differ in ideology, structure, and methodology and often in conflict with each other. For instance, Aliran, Suaram and the Bar Council are deeply involved in democratic and civil rights issues, together with the rights of women, migrant workers and other disadvantaged groups while ABIM, Just World Trust and others have contributed substantially towards internationalising and Islamizing the non-state action scene in Malaysia. They, however, share certain characteristics in that they generally eschew ethnic-based politics, strongly support participatory democracy and are issue-specific in their areas of concern. They have been able in legislative arenas and popular forums to raise mass grievances to which the government has often responded favourably.

The Malaysian government deals with civil associations, in the words of Musa Hitam, "through a complex process of accommodation (where this is fully justified), co-option (where this is required) and confrontation (where this is necessary)".¹¹⁶ On issues like drug rehabilitation, juvenile delinquency, youth and child development or welfare policies, the government has enthusiastically co-operated with

116 Musa Hitam, "Malaysia's Strategic Vision: Into the 21 st Century," in Institute of Strategic and International Studies, *Malaysia: Past, Present, and Future* (Kuala Lumpur: ISIS, 1987), pg. 6.

civil associations to promote development. For instance, the National Council of Women's Organisation works with the Department of Women's Affairs in the Prime Minister's Department, and the Child Welfare Council works with the Ministry of Welfare. The FOMCA represents consumers' interests on a permanent but ad hoc basis on various committees in eight Ministries including the Ministries of Trade and Industry, Science and Technology, Information, and Finance. More importantly, it has been granted membership in the National Economic Consultative Council to decide on the New Economic Policy after 1990. Likewise, the big business groups are closely tied to the government largely due to the latter's policy of transforming Malaysia into a fully industrialised country by the year 2020. The key business groups do receive government support through direct financial assistance, tax subsidies, free trade zones for industrial development, and the like. In case of disagreement, they present their ideas as apolitical, voicing dissent in non-ideological terms, criticising the government not for what it does but for not doing it well. By pursuing this strategy of promoting good government, they succeeded in wielding a great deal of influence upon a wide range of economic and social policies.

The government's co-option strategy is reflected in the very organisation of the BN. The new coalition began by co-opting the Gerakan Rakyat Malaysia (Gerakan, or Malaysian People's Movement, which formed the state government of the Chinese-majority state of Penang), PAS, and other smaller political parties. The latest example of co-option is the case of Party Melayu Semangat 46 (S46) which had emerged from the 1987 split in UMNO. Semangat 46 could neither provide an alternative to the government nor was it able to forge a viable alliance against the ruling Barisan Nasional. It failed to mobilise the masses and, despite its shift from a multi-ethnic stance to Malay nationalism, it failed miserably in the latest 1995 elections. Ultimately, its leader, Tunjku Razaleigh Hamzah, requested for its reabsorption into UMNO under the pretext of Malay unity and the party was allowed to rejoin UMNO in 1996. There are many organisations that the state has co-opted and consequently there is considerable interdependence between the state and the society's numerous businesses, labour, the intelligentsia, the peasant and other interest organisations.

Tensions arise, however, when some groups adopt an aggressively adversarial stance toward the government and insist on operating outside the framework of co-operation, trust and responsibility. These groups develop a symbolic framework that can articulate opposition to the government. The government, while guaranteeing an autonomous space for political expression to these groups, counters their influence by taking the initiative on the same issue or by creating alternatives to independent civil associations. Thus, the government's initiatives in the Islamization process through building Islamic schools, creating an Islamic bank involving RM 100,000 in capital, establishing the International Islamic University Malaysia, etc., though motivated by religious beliefs, did counter the appeal of the Islamic political opposition, especially of PAS. Whereas the independent *dakwah* (Islamic propagation) movements are countered by the government-controlled Pusat Islam (Islamic Centre) and PERKIM (Pertubuhan Kebajikan Islam Malaysia, Malaysian Islamic Welfare Body). The former propagates an official version of *dakwah* and observes the missionary activities of non-state bodies; the latter supervises missionary activities among non-Malays and certifies conversion to Islam.

The government, however, resorts to security acts, when activists "go too far" and engage in activity subversive of the government and the state, posing danger to the peace and security of the country. These security powers include such acts as The Societies Act of 1996, the Internal Security Act of 1960 (ISA), the Official Secrets Act, 1972 (amended in 1987), and the Printing Presses and Publications Act.¹¹⁷ Enacted at the time of Communist insurgency, the ISA empowers the police to hold for up to 60 days any person for activities deemed prejudicial to the security of Malaysia. The Home minister may authorize further detention for periods of up to 2 years. According to the Government, the goal of ISA is to control internal subversion. The government has repeatedly claimed that it resorts to these security powers to arrest and detain without trial with reluctance. As shown in table 2, government's arrests of persons under the

117 For a discussion of the security and emergency powers available to the government, see Simon Barraclough, "The Dynamics of Coercion in the Malaysian Political Process," *Modern Asian Studies* 19, 4 (Oct. 1985), pp. 797-822.

ISA average 259 persons per year while the arrests average 104 persons per year. Interestingly, major arrests and detentions took place during 1960 to 1979 period. Detentions during 1980-1989 and 1990 to 1999 average 56 and 68 persons per year. In 1999, only four people were arrested under ISA but none was detained. In the year 2000, however, 89 people were arrested and 30 were detained under ISA.

Table II: Total Number of Arrests and Detentions under ISA for Four Decades

Year	Arrests	Detentions	Restriction Orders
1960 - 1969	1605	1199	351
1970 - 1979	6328	1713	1389
1980 - 1989	1346	559	280
1990 - 1999	1066	680	32

Source: *New Straits Times*, Tuesday, September 11, 2001.

According to the information provided by the Home Ministry, a total of 10,504 were arrested and 4,218 people have been arrested under the Internal Security Act since its inception in 1960. As of August 30, 2001, there were only 73 people detained at the Kamunting detention centre.¹¹⁸ Only six of the detainees were affiliated to political parties and they were arrested for trying to overthrow the government by using force. The rest were detained for involvement in various activities including syndicates producing fake identity cards, arms smuggling, international terrorism, and illicit trade.

The ISA is often used against nonpolitical crimes, including those against ostensibly "deviant" Muslim groups like a Muslim martial arts movement called Al-Ma'unah who "urged its members to topple the government by force".¹¹⁹ The group broke into two army camps and stole

118 *New Straits Times*, Wednesday, July 25, 2001.

119 *Ibid.*, July 17, 2000.

a huge cache of weapons in July, 2000. They later hid in the jungle in Sauk, Perak state, and were trapped after thousands of police and army personnel barricaded the area. In the four-day standoff, three people were killed before the group finally surrendered. The 29 members of the group were arrested and detained under ISA. In early August, the government charged the group under Section 121 of the Penal Code with “waging or attempting to wage or abetting the waging of war” against the King. By December, ten of them already pleaded guilty and were sentenced to 10 years in jail. The trial on treason charges against 19 others continues.

Another example of the use of ISA is provided by the actions taken against the allegedly shi’ah-inspired sect, Al Arqam. In June 1994, the government accused Al Arqam of training 313 “holy warriors” in Thailand (where its leader Ashaari Muhammad was exiled), of treating the female members of the sect as “sex slaves” and of propagating deviationist teachings including the claim of its leader as the new Mahdi. The detention of Ashaari and his family members under the terms of the Internal Security Act (which provides for detention without trial for a period of up to two years) and the subsequent banning of the claimed 10,000 strong sect on August 26, 1994 provoked criticism from such bodies as the Malaysian Bar Association, the opposition DAP, and civil rights organizations in Malaysia as well as abroad. It was alleged that the government had abused human rights and that it acted because Al Arqam had political ambitions and was developing as a major threat to the popularity of the ruling party.¹²⁰ Critics at home and abroad were silenced, however, when, on October 20, 1994, Ashaari and his core group appeared on television to recant, saying they had indeed practised a deviationist form of Islam. Ironically, the human rights-motivated groups had failed to see that Al Arqam movement, though it contained many admirable and laudable aspects, was itself a major abuser of human rights, especially of women’s rights in the role it assigned to women in Al Arqam communes.

120 Michael Vatikiotis, “Radical Chic: Islamic Fringe Groups Gain Influence among the Elite,” *Far Eastern Economic Review*, 26 May 1994.

There are numerous other occasions when the government used its security powers to maintain peace and order in the society. Thus, in 1987, the government detained over 100 people and banned political rallies to maintain order. In 1998, the police detained about 28 people under the ISA after a series of anti-government demonstrations that threatened national security. Lately, in April 2001, the Government arrested 10 top ranking opposition leaders and civil rights activists who allegedly planned street demonstrations for a violent overthrow of government. The Government also imposed stringent penalties on editors and publishers if they published what the government regarded as "false" news and empowered the Minister of Information to revoke the license of any private broadcasting companies not conforming to "Malaysian values". The government (subsequently with the support of the High Court ruling in 1991) banned the public sale of political party newspapers.

Opposition leaders, NGOs and human rights organizations continue to call on the Government to repeal ISA and other similar legislation. Aliran, Hakam and Suaram signed a memorandum protesting arrests of human rights activists and demanding immediate repeal of ISA, a "universally condemned instrument of colonial and authoritarian rule".¹²¹ However, the Home Ministry Parliamentary Secretary told the parliament that the Government has no plans to do away with the ISA and that the majority of the peace-loving Malaysians support the use of the Act. He, however, assured that the Act would not be misused.¹²² Back in 1995, the Prime Minister wrote that "the ISA is a powerful instrument and the Government can very well abuse its use.... If in fact the people feel that the ISA is oppressive and undemocratic, they can always vote the Government out of power."¹²³

121 "Protest Against the 2001 ISA Arrests", *Aliran Monthly*, 21:3 (2001), 8-9. The entire issue is devoted to "Detention and Repression: No to ISA".

122 *New Straits Times*, Tuesday, July 31, 2001.

123 Mahathir Bin Mohamad, *The Malaysian System of Government* (Kuala Lumpur: Prime Minister's Office, 1995), pp. 49-50.

State Islamic Behaviour

The government of Malaysia has for long been carrying out activities to promote Islam. There are many state-aided Islamic institutions like National Council for Islamic Affairs, State Councils of Muslim Religion, Fatwa Committees, the Islamic Research Centre, the Department of Religious Affairs, Universiti Islam Antarabangsa Malaysia International Islamic University Malaysia), Institut Kefahaman Islam Malaysia (Institute of Islamic Understanding Malaysia, IKIM) and Tabung Haji. Qur'an recitation competitions are held on a regular basis. The television and radios air the Azan (call for prayers); Islamic programmes are regularly featured; Islamic salutations and prayers are offered at most government functions. There is a drastic increase in the number of female students wearing the *tudung* (headscarf) and male students wearing the *kopiah* (skull cap). Important occasions like annual convocations are accompanied by loud *nasyid* music, i.e., the Malay version of Islamic pop music. Few Muslim countries in the world have gone as far as Malaysia in the attempt to use the power of the state to enforce for Muslims the prescriptions of the Qur'an and the Hadith.

Public Opinion on the Malaysian Political System

The Malaysian political system, most commentators agree, has been responsible for the spectacular growth of the country's economy. The government has swelled the country's middle class by recruiting bureaucratic managers into new state enterprises, and by promoting new businessmen and professionals with state contracts, licenses, and scholarships. Interestingly, the members of this middle class generally describe the political system as responsive and responsible. Saravanamuttu's 1992 survey of office bearers (members of the middle class) in various ethnic organisations shows that 91 percent of the Malays, 59 percent of the Chinese and 62 percent of the Indians considered the country's electoral system as just.¹²⁴ Barraclough had earlier argued that the regime's use

124 Johan Saravanamuttu, "The State, Ethnicity and the Class Factor: Addressing Non-violent, Democratic Change in Malaysia", in Kumar Rupesinghe (ed.), *Internal Conflict and Governance* (New York: St. Martin's Press, 1992), pg. 56.

of security and emergency powers against its opponents has not been strongly disapproved by most of the population.¹²⁵

A survey of political attitudes carried out by Bridget Welsh in urban Kuala Lumpur, rural Peninsular Malaysia and Sabah, in 1996, is revealing. Survey findings suggest that Malaysian respondents (a total of 395) asked for "responsive government" above "individual rights or other elements in a democracy".¹²⁶ Though they supported strongly the freedoms to protest and associate, a majority of the respondents did not support the right to strike. This attitude is in line with the current Malaysian government policy that limits the right to strike. Likewise, the respondents were willing to restrict involvement in politics for those groups perceived to threaten social order, lacking qualifications to participate, or holding "deviant views."¹²⁷ Thus, they enthusiastically supported the political involvement of non-governmental organisations in politics; they were less enthusiastic about other groups. A majority of respondents though did not support the right of labour to strike; nevertheless they felt that labour unions should be involved in politics. They were, however, skeptical about the involvement of civil servants and religious leaders in politics. As for the students, a majority of the respondents felt that "students were not old enough to participate" and thus supported the current regime's limit on student involvement. One may thus summarise by observing that in so far as the attitude towards political participation in Malaysia is concerned, there exists a community of shared norms and values between the government and the governed. Furthermore, politically salient sections of the Malaysian population perceive that their rulers are ruling according to the aforementioned norms. The Malaysian public is basically satisfied with the performance of their political system and hence the government has been able to gain and sustain legitimacy, which is at the core of the Islamic political system.

125 Simon Barraclough, "The Dynamics of Coercion in the Malaysian Political Process", pg. 820.

126 Bridget Welsh, "Attitudes Toward Democracy in Malaysia: Challenges to the Regime", *Asian Survey* 36, 9 (September 1996), pg. 887.

127 *Ibid.*, pg. 888.

There is great deal of emphasis on freedom of conscience and human rights in Malaysia. It is highly regrettable that most of the Muslim countries do not have good record in this field. Freedom of conscience, human rights and people's participation in public affairs are quite integral to each other. Most of the Muslim majority countries today which have declared themselves as "Islamic republic" have banished the democratic discourse as well as human rights discourse. It is erroneous to maintain that an Islamic society cannot admit of human rights. The lack of public participation and human rights is not because of Islam or Islamic teachings but due to authoritarian and corrupt regimes which totally lack transparency in governance.

Conclusion

Malaysia has never been a secular state neither in its Marxist variant nor as it is understood in the Western literature. Consequently, it is natural for the debate on the state of Islam to revolve around the concept of Malaysia as an Islamic state. The simple declaration by the highest ranking authority, the Prime Minister of Malaysia, should suffice to qualify Malaysia as an Islamic state. Nevertheless, a serious study is warranted to examine the features that would warrant according Malaysia the status of an Islamic state.

In examining the essential features of an Islamic state, one has to take situation in totality and develop certain keys to deal with the evolving situation. The way the concept of Islamic state was understood by early scholars conformed to their own socio-cultural situation. Their analyses and findings should not be binding on the subsequent generations as it will not conform to the changed situation. What is required, however, is to stick to the framework of values that were deduced by referring to the Qur'an and the practices of the Prophet (saw). The Islamic tenets, it has been argued, do not disapprove of composite or pluralistic way of life. The *Mithaq-e-Madinah* clearly approves of pluralistic set up. Also the emphasis of the *mithaq*, which conforms to the Qur'an, is on Shari'ah, Shura, justice, tolerance and principle of accountability and transparency in governance.

Judged by the above principles, it would seem that Malaysia fulfills the requirement of an Islamic state. Malaysia is a plural society and the non-Muslims are treated with respect and with full rights. The Constitution recognizes the role of Islam and provides legal cover to various Islamic institutions. The cabinet structure of government and the system of federal, parliamentary democracy accord well with Islamic principles. Elections are held regularly and there is an orderly procedure of change. Shura is practiced in the Conference of Rulers, in the cabinet and in the parliament.

It cannot be denied that Malaysia's "Islamic state" status did not measure up to the requirements as rigidly specified by the earlier 'Ulama. This would simply mean that there is ample room for improvement. It cannot be denied, however, that no Muslim country in the world has gone as far as Malaysia in the attempt to use the power of the state to enforce the prescriptions of the Qur'an and the Hadith. To judge such a modern state as alien to Islamic principles, despite its professing and practising to be an Islamic state, is not in conformity with Islamic teachings. Allamah Iqbal once remarked that it is not wise to assume the existence of things that really does not exist. It is much advisable to accept the reality and to exploit it to the maximum advantage to usher a just, humane world order.

In conclusion, it must be noted that there is an underlying societal demand for stronger Islamic commitments from the governing elite in Malaysia. The government of Malaysia responded to the public call and declared Malaysia to be an Islamic state. A survey conducted by ASLI in Malaysia in November 2001 showed that about 86% of Malaysian respondents felt that Malaysia is a moderate Islamic state.

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